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# In the Supreme Court
## of the United States

TERM: OCTOBER, 1997

GARY HOEFLER, et al., *Petitioners,*

v.

BRUCE BABBITT,
SECRETARY OF THE INTERIOR, et al.,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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142 pp

## QUESTIONS PRESENTED

1. Are miners entitled to have their unpatented mining claim possessory interests determined under the Quiet Title Act, 28 U.S.C. §§ 1346(f) and 2409(a), as a matter of statutory law as well as federal due process?

2. Does the Federal Land Policy and Management Act's Section 314(c) forfeiture provision operate to void a mining claim for which a timely but defective adverse possession filing had been made?

3. What is the proper public policy test to be used to decide whether estoppel applies to the Government in cases where property interests are at stake?

## PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioners Gary Hoefler, Don Wurster, Cameron Anderson, and Robin Anderson, (Owners of the Wilson Mining Claim), were the Plaintiffs-Appellants in the Ninth Circuit Court of Appeals proceedings.

Bruce Babbitt, Secretary of the Interior, Michael Dombeck, Acting Director, Bureau of Land Management, Elaine Zielinski, State Director, Oregon State Office, Bureau of Land Management, United States Department of the Interior, Dan Glickman, Secretary of Agriculture, Jack Ward Thomas, Chief Forest Service, Robert W. Williams, Acting Regional Forester, Mike Lunn, Forest Supervisor, Siskiyou National Forest, Mary Zuschlag, District Manager were the Defendant-Appellees in the Ninth Circuit Court of Appeals proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ..... ii

APPENDICES ..... v

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

I. This Court Is Asked For The First Time To Resolve Jurisdictional Confusion Between The DOI And Federal District Courts Under The QTA, Where Mining Claimants Seek To Adjudicate Possessory Interests With Respect To Unpatented Mining Claims. ..... 9

II. The Ninth Circuit *Hoefler* Case Held That Petitioners Could Not Validate The Wilson Placer Mining Claim Through The Doctrine of Adverse Possession. In So Holding, The Ninth Circuit Failed To Follow This Court's

Tests In *Chevron USA, Inc. v. Natural Resources Defense, Supra* 467 US at 842-843. ..... 17

III. This Court Is Requested To Establish A Rule Of Equitable Estoppel Requiring Federal District Court And Agency Decisions To Conform With The Public Policies Underlying The Statutes. ..... 21

CONCLUSION ..... 27

## APPENDICES

Opinion of the United States Court of Appeals for Ninth Circuit — App. A

Opinion, Order and Judgment of the United States District Court for the District of Oregon — App. B

Decision of the United States Department of the Interior, Interior Board of Land Appeals — App. C

Constitutional Provisions, Statutes and Regulations — App. D

Miscellaneous - Excerpts from the Record — App. E

# TABLE OF AUTHORITIES

## CASES

*Best v. Humboldt Placer Mining Co.*, 371 US 334 (1963) . . . . . 10, 11, 23

*Block v. N.D. Ex Rel. Bd. of University & Sch. Lands*, 461 US 273 (1983) . . . . . 11, 15

*California Dolomite Company v. Standridge*, 275 P2d 823, (Cal. App. 1954) cert den. 349 US 921 (1955) . . . . . 12

*Cameron v. United States*, 252 US 450 (1920) . . . . . 11

*Chevron, USA, Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984) . . . . . 11, 17, 18, 20

*Clouser v. Espy*, 42 F3d 1522 (9th Cir. 1994) . . . 11, 12, 15

*Connecticut v. Doehr*, 501 US 1 (1991) . . . . . 13

*Erhardt v. Boaro*, 113 US 527 (1885) . . . . . 13

*Heckler v. Community Health Services of Crawford County, Inc.*, 467 US 51 (1984) . . . . . 22, 26

*Hoefler v. Babbit*, 127 IBLA 211 . . . . . Passim

*Oliver v. Burg*, 154 OR 1, 58 P2d 245 (1936) . . . . . 13

*United States v. Locke*, 471 US 84 (1985) ..... 9, 13, 14, 16, 19-22

*United States v. Wharton*, 514 F2d 406 (9th Cir. 1975) ..... 24

*Webb v. Lujan*, 960 F2d 89 (9th Cir. 1992) ..... 17

*Wilbur v. United States*, 280 US 305 (1930) ..... 23

CONSTITUTION

Article III, Section 2, of the United States Constitution .. 3

Fifth Amendment ..... 2, 3, 6

STATUTES

5 U.S.C. §§ 701-706 ..... 2, 3

28 U.S.C. § 1254 ..... 3

28 U.S.C. § 1291 ..... 3

28 U.S.C. § 1331 ..... 2, 3

28 U.S.C. § 1346(f) ..... 2, 3, 9, 16

28 U.S.C. § 1361 ..... 2

28 U.S.C. § 2106 ..... 3

28 U.S.C. § 2201 ..... 2

28 U.S.C. § 2409(a) ..... 2, 3, 9, 10, 14

30 U.S.C. § 21 ..... 2

30 U.S.C. § 21a ..... 3, 22

30 U.S.C. § 22 ..... 3, 7

30 U.S.C. § 26 ..... 3, 4, 6, 8, 9

30 U.S.C. § 28 ..... 3, 4

30 U.S.C. § 30 ..... 3, 9, 14, 23

30 U.S.C. § 32 ..... 3, 9

30 U.S.C. § 34 ..... 3, 12

30 U.S.C. § 38 ..... 2-5, 9, 11, 18, 19, 21, 23

30 U.S.C. § 623 ..... 3, 4, 19, 26

43 U.S.C. § 1744 ..... 2, 3, 4, 18, 19, 23

FLPMA, Sect. 314(c) ..... 4, 18-21

FLPMA, Sect. 314(b) ..... 4, 20

ORS 517.010 ..... 3, 8

ORS 517.044 ..... 3, 8

ORS 517.052 ..... 3, 8

ORS 517.080 ..... 3, 8

ORS 517.090 ..... 3, 8

REGULATIONS

43 CFR §4.415 ..... 6

43 CFR § 1821.2-2(a)(b)(c)(g) ..... 3, 26

43 CFR § 3833.1-2 ..... 3

43 CFR § 3871.3 ..... 3, 14

LEGISLATIVE HISTORY AND MISCELLANEOUS

H. Rep. No. 92-1559, 92nd Cong., 2nd Sess., Reprinted in [1972] US Code Cong. and Admin. News 4547, 4552 ... 9

Schuster, P. and Dierking, R. "Future Prospects for Mining and Public Land Management: The Federal 'Retention-Disposal' Policy Enters the Twenty-First Century" 26 Envtl. L.489 (1996) ..... 24

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

GARY HOEFLER, et al., Petitioners

v.

BRUCE BABBITT,
SECRETARY OF THE INTERIOR,
et al , Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioners, Gary Hoefler, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 20, 1998.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 139 F3d 726 and is reprinted in Appendix A hereto.

The memorandum decision of the United States District Court for the District of Oregon is reported at 952 F. Supp. 1448 and is reprinted in Appendix B hereto.

The decision of the Department of the Interior Board of Land Appeals (IBLA) is issued at 127 IBLA 211 and is reprinted in Appendix C hereto.

## JURISDICTION

The Petitioners filed suit in the District Court of the District of Oregon pursuant to:

(1) 28 U.S.C. §§ 1331, 1361 and 2201, for a construction of the Federal Land Policy and Management Act (FLPMA) 43 U.S.C. § 1744 filing requirements and abandonment provisions under Fifth Amendment substantive and procedural due process standards to decide questions of law concerning the timely filed 1934 amended notice of location for the Wilson placer mining claim. The Department of the Interior (DOI) found that the claim had a defective title which would not serve to enable establishing the claim by adverse possession pursuant to the mining laws, 30 U.S.C. § 38;.

(2) 28 U.S.C. § 1346(f), giving district courts exclusive original jurisdiction of civil actions against the Government to quiet title, and the Quiet Title Act (QTA), 28 U.S.C. § 2409(a), to decide the title, rights and validity of the unpatented Navajoe and Wilson mining claim locations made under the mining laws, 30 U.S.C. § 21 et seq.;

(3) 5 U.S.C. §§ 701-706, the Administrative Procedure Act (APA), for review of the IBLA decision which voided the 1929 Wilson claim and which denied an evidentiary hearing and rejected equitable estoppel claims.

On October 7, 1996 the District Court granted the Government's motion for summary judgment and issued its Judgment and Order of Dismissal.

Petitioners filed an appeal to the Ninth Circuit pursuant to 28 U.S.C. §§ 1291 and 2106 and Article III, Section 2, of the United States Constitution for a de novo review of the District Court's order. On March 20, 1998, the Ninth Circuit entered a judgment and order affirming the District Court's dismissal of Petitioners' action.

Petitioners believe that 28 U.S.C. § 1254 (1) confers the Supreme Court with jurisdiction to review on a writ of certiorari the order in question, based on the constitutional, statutory and regulatory provisions involved.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment Due Process Clause, APA, 5 U.S.C. §§ 706, 28 U.S.C. § 1331, the QTA, 28 U.S.C. § 1346(f) and 2409(a), the United States Mining Laws, 30 U.S.C. §§ 21a, 22, 26, 28, 30, 32, 34 and 38, the Mining Claims Rights Restoration Act (MCRRA), 30 U.S.C. § 623, FLPMA, 43 U.S.C. § 1744(b) and (c), Oregon Laws ORS 517.010, 517.044, 517.052, 517.080, 517.090 and Department of the Interior (DOI) regulations 43 CFR §§ 1821.2-2(a)(b)(c)(g), 3833.1-2, 3833.4(a), and 3871.3, are reprinted in Appendix D hereto.

## STATEMENT OF THE CASE

In this case, the Ninth Circuit affirmed a District Court decision upholding an IBLA decision decided September 14, 1993 voiding possessory rights and title to the Petitioners' unpatented Wilson placer mining claim, established under the mining laws, 30 U.S.C. §§ 26, 28. (App. A-9 and App. B-37).

IBLA affirmed a Bureau of Land Management (BLM) Oregon State Office decision dated June 6, 1990 that had been requested by the Forest Service to void the Wilson claim. (App. C-1,18,19). Since the land is withdrawn from mineral location, no opportunity was provided to the Petitioners to relocate the claim.

BLM voided the Wilson claim located on September 3, 1929 on the basis that the claim was located on national forest land which was withdrawn on January 7, 1926 from mineral location until opening of the lands on August 11, 1955 under the MCRRA, 30 U.S.C. § 623. (App. C-2,9).

Information submitted by the Petitioners to BLM and to IBLA was rejected as not establishing that the 1929 Wilson claim possessory rights and title related back to a 1912 Navajoe claim preceding the 1926 power site withdrawal of the land. (App. C-2).

IBLA rejected Petitioners' further claim that possessory rights and title to the Wilson claim had been established by adverse possession under 30 U.S.C. § 38 and that a 1934 amended notice of location for the Wilson claim met the filing requirements for FLPMA, 43 U.S.C.1744 (b). Section 314(b) and Section 314(c) of

FLPMA were interpreted by IBLA as operating to abandon Petitioners' Wilson claim because the notice of location for the void Wilson claim would not serve as a timely filing for registration of the Wilson claim established by adverse possession under 30 U.S.C. § 38. (App. C-15,16).

Equitable estoppel claims were rejected by IBLA on the basis that Petitioners' had not alleged that any official of the Government actively deceived them in any way, nor did they point to any law that would have required Federal employees to have handled their claim documents otherwise than they were handled in this case. (App. C-17,18).

Petitioners argued that the Government was estopped from voiding the Wilson mining claim for the following reasons: (1) In 1956, BLM had examined a 1934 amended notice of location for the Wilson Claim, had asked for location information and had registered the filing made under the MCCRA. BLM did not notify the Wilson claim owners that the filing was not made within the statutory filing deadline and that the claim was located when the lands were withdrawn from mineral location and should be relocated. (App. E-1). (2) In 1965, the Forest Service examined the Wilson claim mineral occupancy and uses as well as possessory title relating back to a 1912 Navajoe placer mining claim. (App. E-2-8). The report noted that two deeds were missing from the chain of title. The report recommended that action be taken to determine the validity of the Wilson and to acquire the property for public recreation purposes but did not recommend that the Wilson claim owners be notified to relocate their mining claim. (App. E-7,8). (3) In 1980, the Forest Service

examined the Wilson claim on the ground as well as possessory title. (App. E-8-12). Rather than notifying the Wilson claim owners that the Wilson claim was invalid, the Forest Service validated the Wilson claim for approval of a plan of operations. (App. E-13). (4) In December 1988 the Forest Service, accompanied by one of the Petitioners, examined the mineral exposure on the unpatented Wilson placer mining claim for compliance with mineral discovery requirements of the mining laws, 30 U.S.C. § 26. (App. E-14-20). (5) Petitioners requested BLM to obtain a copy of all Forest Service records relating to the Wilson claim including records on the 1988 mineral validity examination, but the records were not provided to the Petitioners or BLM. (App. E-20-22).

Petitioners' request for a hearing pursuant to 43 CFR §4.415 was denied by IBLA on the basis that the record for these old placer claims "is as complete as it is ever likely to be." (App. C-14). IBLA ignored Petitioners' request for an opportunity to have possessory rights and title determined by a state court, or by the federal district court pursuant to the QTA. (App. E-23-25).

The District Court opinion dated October 7, 1996 granted the Government's motion for summary judgment and dismissed Petitioners' complaint for a determination of possessory title under the QTA. (App. B-39). The District Court held that IBLA had already made a determination of the validity of possessory title and QTA jurisdiction was precluded under the APA. (App. B-12-15, 21-30).

Also, the District Court dismissed the Petitioners' Fifth Amendment due process, adverse possession and

equitable estoppel claims. (App. B-20-21, 30-33, 35-37).

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court's rulings. The Ninth Circuit held that the District Court's rejection of Petitioners' equitable estoppel claim was reviewable under the abuse of discretion standard and courts remain free to reject the application of estoppel in cases where the required elements are present, when, in the exercise of their discretion, they find that "countervailing reasons of pubic policy" so require. (App. A-3,4). As to the adjudication of the validity of mining claim possessory rights and title, the Ninth Circuit held that the DOI has plenary authority to invalidate mining claims. It further held that no statute provides for a procedure for IBLA to refer a QTA claim to the district court and that in the absence of a private right of action, the District Court properly reviewed this case under the APA. (App. A- 4-9).

## REASONS FOR GRANTING THE WRIT

Underlying the substantial federal questions presented by the Ninth Circuit's holding in this case is a fundamental departure from the 1872 cooperative federal, state and private mining program for federal lands under 30 U.S.C. § 22.

The Ninth Circuit's holding conflicts with important decisions of this Court by extending the plenary authority of the DOI beyond simply establishing mining claim mineral "discovery" standards and authority to determine the validity of mining claim "discoveries."

Prior to this case, states had authority to enact laws governing mining claim possessory matters involving location, title, registration, sale, assignment, and descent of unpatented mining claim properties. See, eg. ORS 517.010, 517.044, 517.052, 517.080 and 517.090. (App. D-22-26). State courts had authority to determine legal and equitable questions concerning these possessory rights and interests. Miners were afforded full evidentiary hearing rights.

It is, therefore, unprecedented for the Ninth Circuit to authorize the DOI, exclusively, to decide mining claim possessory and title issues without a full hearing, rather than allowing Petitioners to have their legal and equitable possessory title determined and quieted by a state court of competent jurisdiction or by a federal district court under the QTA.[1]

The Ninth Circuit holding undermines the cooperative federal mining program and diminishes the bona fide possessory property rights of all mining claims

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[1] Mining claim locators' rights of possession and enjoyment under 30 U.S.C. § 26 are broader matters of fact and law to be determined by the courts than are narrower matters of possessory title derived through deeds or notices of location. Possessory title does not control possessory rights. Unless the term possessory title is specifically mentioned herein, Petitioners refer to mining claim possessory interests or rights as encompassing the bundle of rights to be determined by the courts - namely the right to locate, exclusively possess, mine, sell, inherit and patent minerals.

registered with BLM under FLPMA since 1976.

I. This Court Is Asked For The First Time To Resolve Jurisdictional Confusion Between The DOI And Federal District Courts Under The QTA, Where Mining Claimants Seek To Adjudicate Possessory Interests With Respect To Unpatented Mining Claims.

In the instant case, the Ninth Circuit created confusion between the DOI's plenary jurisdiction to decide mining claim validity issues involving mineral "discoveries" and the QTA's provision vesting federal district courts with exclusive original jurisdiction over private rights of action to adjudicate possessory property interests, 28 USC §§ 1346(f), 2409(a) (App. D-3,4).

QTA jurisdiction and the private right conferred by the Act harmonize with the statutory procedural rights granted to miners in the mining laws, 30 U.S.C. § 30, 32 and 38 (App. D-8-11). Under the mining laws, miners are given rights to have their possessory interests and title determined by courts of competent jurisdiction. However, the Ninth Circuit decision undercuts miners' statutory procedural rights by giving the DOI exclusive jurisdiction to decide mining claim possessory interests.

An unpatented mining claim remains a fully recognized possessory interest. 30 U.S.C. § 26, (App. D-6,7); *United States v. Locke,* 471 US 84, 86 (1985). In enacting the QTA, Congress intended for the Act to apply to an estate less than fee simple, namely title to minerals. H. Rep. No. 92-1559, 92nd Cong., 2nd Sess., Reprinted in [1972] US Code Cong. and Admin. News

4547, 4552.

The Ninth Circuit decision fails to analyze whether the QTA confers exclusive original jurisdiction in federal district court when the claimant (as opposed to the Government) seeks a determination of possessory title validity. *Hoefler v. Babbit,* (App. A-6). The decision does not analyze whether the QTA, in conjunction with the mining laws, confers exclusive original jurisdiction to decide the issue of mineral possessory rights, including title validity, where a claimant exercises statutory rights to have possessory rights and title decided by either a state court of competent jurisdiction or a federal district court under the QTA. Here, notwithstanding the Petitioners' request, the agency itself decided the possessory rights and title issues.[2] In deciding and voiding Petitioners' possessory rights without allowing them opportunity to obtain a judicial determination, IBLA clearly acted without authority and deprived petitioners of their statutory procedural rights.

The Ninth Circuit also failed to analyze whether this Court's holding in *Best v. Humboldt Placer Mining Co.,* 371 US 334, 336 (1963) confirms whether primary

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[2] Petitioners, in their July 30, 1990 appeal to IBLA, exercised their statutory procedural rights by requesting the following: "...Appellants respectfully request that the Board allow opportunity for Appellants to submit additional documents, an Oregon court determination establishing Appellants' title, or a federal district order pursuant to 28 U.S.C. Sec. 2409a quieting any adverse interest of the United States in the Wilson claim...." (App. E-24).

jurisdiction is vested in the DOI to determine all mining claim validity issues or simply validity issues having to do with whether or not a mineral "discovery" exists on the claim. *Hoefler v. Babbitt* (App. A-4,5). The *Best* case is distinguishable from the instant *Hoefler* case. Unlike the *Best* case and its progeny, the *Hoefler* case does not involve a contest of a mineral "discovery." Rather the *Hoefler* case involves a determination of possessory title to an unpatented mining claim. Cf. *Best v. Humboldt Placer Mining Co., supra* 371 US at 335. See also, *Cameron v. United States*, 252 US 450, 456 (1920).

A resolution of the jurisdictional confusion begins with this Court's holding in *Block v. N.D. Ex Rel. Bd. of University & Sch. Lands,* 461 US 273, 286 n.22 (1983), recognizing that actions for judicial review under the APA and QTA actions are mutually exclusive. In this case, DOI's interpretation of FLPMA's forfeiture provision, as applied to other federal laws (such as the adverse possession statute, 30 U.S.C. § 38), is questioned. Had the Ninth Circuit followed the tests developed by this Court in *Chevron, USA, Inc. v. Natural Resources Defense,* 467 U.S. 837 (1984), there would have been no jurisdictional confusion. Petitioners' QTA claim would have been allowed. (See discussion at pp 17-21, infra).

Petitioners also contended during the agency proceedings that their right to procedural due process was infringed because of the "abbreviated" hearing afforded to them by DOI, as sanctioned in *Clouser v. Espy*, 42 F3d 1522, 1540 (9th Cir. 1994). See, *Hoefler v. Babbit,* (App. B-20). The extent of this "abbreviated" administrative procedure conforms to the very narrow "record review"

doctrine - that the adjudication necessarily involves simply taking notice of matters that are of federal, not state, record. See, *Hoefler v. Babbit* (App. B-26-29). The sanctioning of such an abbreviated procedure by the agency conflicts with established mining law.

Possessory title claims involve many factual and equitable questions extrinsic to the agency record, such as erection and marking of monuments on the ground and use made of the claims. 30 U.S.C. § 34 (App. D-9,10); *California Dolomite Company v. Standridge*, 275 P2d 823, 825 (Cal. App. 1954) cert den. 349 US 921 (1955). The abbreviated procedure endorsed by the *Clouser* and *Hoefler* decisions omits the essential due process safeguard of compelling production of evidence and attendance of witnesses crucial to a determination of possessory rights and title issues. See e.g. *Hoefler v. Babbitt*, (App. B-28, 29) (the District Court discusses why an Environmental Assessment Report, which was favorable to Petitioners and which was omitted from the agency record, should be excluded. The decision fails to note that Petitioners were never given a timely opportunity to subpoena and examine the authors of this document. See, App. E-8-12).

Here, Petitioners had requested the DOI to produce all Forest Service records (App. E-20-22), which included records relating to a 1988 mineral examination. A specific request was made for these mineral examination records because Petitioners were informed and believed that the records would be helpful to their possessory title case. (App. E-16,17). The agency withheld records relating to the mineral exam throughout the entire "abbreviated" administrative procedure. (App. E-16, 23). No means

existed administratively for Petitioners to compel production of these records from the DOI.

Records relating to a "discovery" of a mineral deposit involve facts such as the location of the mineral and discovery exposures on the ground, as well as use of mining improvements. These factors are all elements of possession to be considered by a court of competent jurisdiction to determine possessory rights. Evidence of a mineral "discovery" is therefore a material fact in adjudicating possessory rights and title issues to a mining claim. Historically, a mineral "discovery" has always incorporated the concept of mining claim "location." *United States v. Locke, supra,* 471 US at 86; *Erhardt v. Boaro,* 113 US 527, 535 (1885) ("...discovery and appropriation are recognized as the sources of title to mining claims...."). Because Petitioners' QTA action was dismissed, Petitioners were not allowed to utilize, to the fullest extent, federal district court discovery procedures to compel production of critical mineral examination records.

History as well as contemporary practice, *Connecticut v. Doehr,* 501 US 1, 23 (1991), support the conclusion that federal due process requires a full evidentiary hearing for miners of a type that is afforded under the QTA, as opposed to the DOI's "abbreviated" procedure. See, e.g. *Oliver v. Burg,* 154 OR 1, 20, 58 P2d 245, 253 (1936) (confirming the historic practice that in suits to quiet title to unpatented mining claims, miners have traditionally been accorded the right to a full adjudicatory hearing before a court of competent jurisdiction).

Recognizing the fairness that full hearings afford in

the context of mining claim adjudications, this Court in *United States v. Locke, supra,* 471 US at 110 remanded the case, not to the agency, but to the federal district court for full and fair consideration of equitable and other issues left unresolved. See, also, *supra* 471 US at 112 (J. O'Connor concurring, noting that the District Court may consider elements of equitable estoppel).

A full evidentiary hearing requirement is a central tenet of the contemporary mining patent process. This patent process, which directly involves the Government's title in lands, recognizes that possessory title issues are to be referred to "a court of competent jurisdiction, to determine the question of right of possession...." 30 U.S.C. § 30; 43 CFR § 3871.3. (App. D-8, 20-22). The same principle applies here.

Where possessory rights or title are at issue, a private right of action is available to Petitioner miners with a full evidentiary hearing under the QTA, because the statute itself confers the right. 28 U.S.C. § 2409(a). (App. D-3,4). If the DOI contests possessory title to an unpatented mining claim, the agency's plenary jurisdiction is easily harmonized with the QTA. The DOI need only grant the miner's request or require the miner to file a quiet title action against the Government in a court of competent jurisdiction.[3] Had the Ninth Circuit allowed Petitioners' QTA to proceed in this case, the District Court could have

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[3] Here, Petitioners' QTA claims accrued when the BLM challenged Petitioners' mining claim title, culminating on June 6, 1990 with the BLM decision invalidating the title. (App. C-1,2).

done one of two things. It could have proceeded with adjudication of the QTA claim and remanded the case to the DOI for a determination of the "discovery" issue. Or, the District Court could have stayed the QTA claim and remanded the case to the DOI for a determination of the "discovery" issue.

Petitioners fall within the exception to the APA noted by the *Clouser* holding. These Petitioners challenge "an agency action [the IBLA decision] as violating a federal law [the QTA] ... that has been interpreted as conferring a private right of action...." *Clouser v. Espy, supra,* 42 F3d at 1528 n.5 (bracketed matter added). The agency action challenged was (1) IBLA's refusal to provide for a full evidentiary hearing on the issue of possessory rights and title to the unpatented claim and (2) IBLA's holding which prevented establishment of Petitioners' title by adverse possession, contrary to principles of proper statutory interpretation and constitutional due process.

The QTA is "a federal law" that confers upon unpatented mining claim holders "a private right of action" and right to a full evidentiary hearing to clear title to their possessory property interest. See, *Clouser v. Espy, supra* 42 F3d 1528 n.5.[4] This right exists notwithstanding the DOI's primary jurisdiction to otherwise decide if a "discovery" exists on the claim. The right also exists

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[4] Congress enacted the QTA primarily to give private citizens recourse to resolve title disputes against the Government. *Block v. N.D. Ex Rel. Bd. of University & Sch. Lands, supra,* 461 U.S. at 297-298 (J. O'Connor, dissenting).

independent of and is mutually exclusive of the Government's right to challenge a mining claimant's chain of title through "abbreviated" agency proceedings. 28 U.S.C. § 1346(f).

The issue is not, as characterized by the Oregon District Court and Ninth Circuit, who has title to the land. Clearly, if the claim is unpatented, the Government has undisputed title to the land. *United States v. Locke, supra,* 471 U.S. at 104. The issue, rather, is who has title to the possessory mineral interest, ie, the unpatented mining claim. The QTA permits title to be quieted in the Petitioners' possessory property interest, subject to the DOI's primary jurisdiction to invalidate the claim for lack of a valid mineral "discovery." If, in the district court QTA action, title is quieted in the Government, then the Government owns the possessory interest and the claim no longer exists.

Neither the District Court nor the Ninth Circuit distinguished between determinations of mining claim possessory rights and "discovery" contest proceedings, and the forums given jurisdiction to make these determinations. The resulting Ninth Circuit holding undercuts Congress' intent in enacting the QTA to confer a private right of action on miners who seek to adjudicate possessory interests to mining claims. The *Hoefler* holding jeopardizes the rights of miners everywhere to have possessory rights and title to their unpatented claims determined in accordance with established property law principles. Instead, the *Hoefler* decision sanctions DOI policy which renders nugatory the very doctrine of adverse possession and other long established property law principles which

would otherwise be available to mining claimants, were they afforded their private remedy to bring a QTA action in federal district court.

II. The Ninth Circuit *Hoefler* Case Held That Petitioners Could Not Validate The Wilson Placer Mining Claim Through The Doctrine of Adverse Possession. In So Holding, The Ninth Circuit Failed To Follow This Court's Tests In *Chevron USA, Inc. v. Natural Resources Defense, Supra* 467 US at 842-843.

The District Court, following *Webb v. Lujan,* 960 F2d 89, 93-94 (9th Cir. 1992), held as follows:

> "As in *Webb,* the predecessors in interest of the [Petitioners] failed to file a document sufficient to identify the type of claim with any degree of particularity and thus fulfill the goals of the FLPMA. Furthermore, no filings were made in successive years, as required by the FLPMA"

(App. B-33; bracketed matter added). Both of the District Court's reasons for failing to validate the Wilson placer mining claim by the doctrine of adverse possession directly conflict with the FLPMA statute. The District Court's holding, and the Ninth Circuit's ratification of that holding, ignore the first test formulated by this Court in its *Chevron* decision.

When agency constructions of agency administered statutes such as FLPMA are judicially reviewed, the first step is to determine the intent of Congress-

> "...whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give affect to the unambiguously expressed intent of Congress."

*Chevron, USA, Inc. v. Natural Resources Defense, supra* 467 US at 842-43.

With regard to validating mining claims by the doctrine of adverse possession, 30 U.S.C. § 38, through the filing of "holding and working" claims, Congress clearly expressed its intention in FLPMA, Sect. 314 (c):

> "The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; *but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof*, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site."

43 U.S.C § 1744(c) (emphasis added) (App. D-14). The District Court invalidated the Wilson placer claim by adverse possession because of purported insufficiency of a document. The clear, unambiguous intention of Congress

in FLPMA is to permit the filing of defective instruments.

The District Court's further rationale was that "no filings were made in successive years, as required by the FLPMA." However, nothing in FLPMA statutorily governs the elements necessary to prove adverse possession under 30 U.S.C. § 38. Whether the filings for the Wilson Claim made after 1979 were sufficient is a question for determination pursuant to the QTA.

In addition, 43 U.S.C. § 1744(c) explicitly excludes from the abandonment provisions instruments which are "not timely filed for record under other Federal laws permitting filing or recording thereof." The MCRRA is such an "other Federal law" within the meaning of this statute permitting late filings without unnecessary abandonment of mining claims. There is no abandonment provision contained within the MCRRA, 30 U.S.C. § 623. (App. D-11, 12). Nevertheless, the District Court, erroneously following *United States v. Locke, supra* 471 US at 100-101, held that Petitioners' late filing by two days under the MCRRA resulted in a forfeiture of the Wilson claim. (App. B-33-35).

The District Court failed to follow the unambiguous expressed intent of Congress in Sect. 314(c) which permits miners to establish and file claims by adverse possession, notwithstanding that the "holding and working" claim may be defective.

Assuming, arguendo, that in enacting Sect. 314(c) of FLPMA, Congress did not unambiguously address the precise situations mentioned above, then the District Court

and Ninth Circuit were compelled to follow this Court's second step announced in the *Chevron* decision - to determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron, USA, Inc. v. Natural Resources Defense, supra,* 467 US at 843.

IBLA's application of FLPMA's forfeiture provision to the adverse possession statute is impermissible for two reasons. First, IBLA's interpretation is unreasonable because it voids bona fide, actively worked mining claims for which information is available to the Government. This was not the intention of Congress in enacting FLPMA. See, *United States v. Locke, supra,* 471 US at 87 (enactment of Sect. 314 of FLPMA "establishes a federal recording system that is designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions.")

Secondly, IBLA's interpretation of the applicability of FLPMA to establishment of mining claims by adverse possession conflicts with this Court's reason for upholding the constitutionality of the forfeiture provisions of FLPMA in *United States v. Locke, supra* 471 US at 104-109. In *Locke,* this Court held that Sect. 314(c) of FLPMA does not violate procedural or substantive due process because the statute is both reasonable and its purposes are legitimate - to eliminate stale mining claims and to provide for centralized collection of information regarding unpatented mining claims. *Supra* 471 US at 105-106. In addition, this Court found that the burden imposed upon miners by requiring the filing of a paper once a year indicating performance of assessment work, was not unduly

burdensome. Id.

Here, however, IBLA's construction of FLPMA, as applied to establishment of mining claims by adverse possession under 30 U.S.C. § 38, achieves none of the purposes Congress intended and is far more burdensome than the annual filing requirement imposed by Sect. 314(c).

In the absence of a statute and regulations specifying the requirements, the Ninth Circuit failed to describe how a miner would know when and how to properly file an adverse possession ("holding and working") claim. Such was not the case in *United States v. Locke, supra* 471 US at 107-108, where the statute and regulations clearly provided due process notice.

III. This Court Is Requested To Establish A Rule Of Equitable Estoppel Requiring Federal District Court And Agency Decisions To Conform With The Public Policies Underlying The Statutes.

Under the strict affirmative misconduct standard applied by the District Court and the Ninth Circuit, the courts now remain free to reject claims to estop Government agencies where the elements of estoppel are present even though application of estoppel conflicts with undefined "countervailing reasons of public policy." *Hoefler v. Babbit,* (App. A-3,4).

The Ninth Circuit standard for determining whether estoppel elements are present in any case affecting private economic rights ignores that estoppel should prevent agency actions where the agency substitutes its own

policies in place of statutory public policies and constitutional proscriptions.

This Court has recognized that the defenses of waiver, estoppel and equitable tolling have application in mining claim statutory filing deadline cases, *United States v. Locke, supra,* 471 US 89 n.7, and that a significant consideration is whether miners were "'unable to exercise the usual care and diligence'" that would have allowed them to meet filing deadlines or learn of their existence. *Supra,* 471 US 94 n.10.

The "countervailing reasons of public policy" rule for estoppel adopted in *Hoefler v. Babbitt,* (App. A-3,4) interlocks with this Court's recognition that estoppel may apply against the Government to assure that citizens enjoy "'some minimum standard of decency, honor, and reliability in their dealings with their Government.'" *Supra,* 471 US at 112 (J. O'Connor, concurring and quoting *Heckler v. Community Health Services of Crawford County, Inc.,* 467 US 51, 60-61 (1984)). Here, however, the Ninth Circuit did not remand to the District Court to make a determination as to (1) whether the strict estoppel test utilized by the District Court assured these Petitioners of "some minimum standard of decency" and (2) whether underlying private or public policies compelled either the application or rejection of estoppel.

As to the second point, the public policies underlying the statutes weigh against rejection of estoppel. Rejection of estoppel against the Government would not fulfill public land minerals policies for economic development and production of valuable minerals under 30

U.S.C. § 21a (App. D-4,5). Following the 1988 Forest Service minerals examination, no contest proceedings were instituted to contest the "discovery" of valuable minerals on the Wilson mining claim.

Secondly, underlying public policy compelling application of estoppel principles is bolstered by this Court's long recognition that an unpatented mining claim with a mineral "discovery" confers a possessory property right in the fullest sense of the word and that this right is entitled to constitutional protections. *Best v. Humboldt Placer Mining Co., supra* 371 US at 335, *Wilbur v. United States,* 280 US 305, 316 (1930).

Third, additional public policy rationale underlying application of estoppel, here, is found in the mining statutes themselves, 30 U.S.C. § § 30, 38 (App. D-8,10). A statutory process is provided to mining claimants to protect their possessory rights. 30 U.S.C. § 30. Additionally, where a miner has discovered valuable minerals, a process is provided to the miner to protect his property interest by adverse possession. 30 U.S.C. § 38.

Fourth, and perhaps most importantly, Congress, in enacting FLPMA, reflected the strong public policy to avoid unnecessary forfeiture of mining claims where miners could resort to existing statutes to perfect those claims. As previously discussed, a miner's right to establish possessory rights by adverse possession, pursuant to 30 U.S.C. § 38, is not foreclosed by the FLPMA abandonment provision. Specifically, 43 U.S.C. § 1744 (c) provides an exception to the abandonment of a mining claim by failure to file instruments where, inter alia, "the instrument is

defective...." (App. D-14).

Balanced with the aforementioned constitutional and statutory property and minerals public policies is the DOI's countervailing land retention and mining claim invalidation policies designed to keep the public lands and resources in federal ownership. This retentionist public policy has been formulated and stretched by agency decision making which conflicts with the underlying public policy of not only the mining statutes but FLPMA as well.[5]

Finally, adoption of the strict estoppel test in the *Hoefler* decision creates additional conflicts. The Ninth Circuit's decision endorses an estoppel only where "'ongoing active misrepresentations' or a 'pervasive pattern of false promises'" exists. *Hoefler v. Babbit* (App. B-35). The decision fails to recognize the Government's statutory duty to not accept documents that are not filed within statutory time deadlines. The decision also conflicts with the less stringent estoppel test employed by the Ninth Circuit in *United States v. Wharton,* 514 F2d 406, 412-13 (9th Cir. 1975) (applying estoppel to the Government where a filing officer failed to inform the citizen of the opportunity to file an application).

In this case, the elements of estoppel are present and evident. BLM and Forest Service representations causing

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[5] For a more thorough analysis of retention policies, see Schuster, P. and Dierking, R., "Future Prospects for Mining and Public Land Management: The Federal 'Retention-Disposal' Policy Enters the Twenty-First Century" 26 Envtl. L.489 (1996).

the owners of the Wilson claim to act in reliance and to their detriment are documented agency actions. In 1956, BLM accepted a filing for the Wilson claim for federal registration under the MCRRA. (App. E-1). BLM did not notify the Wilson claim owners that the filing was made too late under the statute, that the claim was void or that the claim should be relocated and refiled while the lands were opened to mining from 1955 to 1968.

The Forest Service in 1965 examined and prepared an official report for the national forest occupancy program on the possessory rights and title for the Navajoe and Wilson mining claim locations. (App. E-2-8). The Wilson claim owners were not notified that the Forest Service questioned the gaps in the Wilson claim title and the validity of the Wilson claim. Later in 1980, the Forest Service again examined the Wilson claim possessory rights and title for approval of a plan of operations. (App. E-8-12 ). Instead of notifying the Wilson claim owners that the claim was void, the Forest Service validated the Wilson claim possessory rights subject to validation of the claim's mineral discovery that had never been contested by the Government. (App. E-12-14).

As a consequence, the Wilson claim owners had no reason to suspect that the Government would void the Wilson claim because the claim was defective and that the claim should have been relocated while the lands were open to mining. Wilson claims owners and the Petitioners invested their money and time in developing the Wilson claim for a period of over 40 years after the MCRRA filing. Since the Wilson claim cannot now be relocated, voiding the Wilson claim means the loss of the Petitioners'

discovery of valuable minerals.

In enacting the MCRRA, Congress, with certain exceptions, required mining claims to be filed within one year after August 11, 1955. 30 U.S.C. § 623 (App. D-11,12). Here, the District Court found that the 1956 filing for the Petitioners' Wilson mining claim was two days late under the MCRRA. (App. B-34). The District Court did not find that the statute, 30 U.S.C. § 623, conferred a duty upon BLM to examine the filing for compliance with the statutory deadline and to return the filing for relocation and refiling of the Wilson mining claim.

In addition, DOI regulations enacted in 1973, codifying prior practice, require filing officers to return documents which are not timely filed. 43 CFR § 1821.2-2 (a)(b)(c)(g) (App. D-14-16). Had the Government filing officers acted in accordance with this regulation with respect to the 1956 Wilson claim filing under the MCRRA, these Petitioners would have been able to exercise "the usual care and diligence" in protecting their possessory property interest. They would have relocated the Wilson claim during the period of time that the lands were open to mineral location from 1955 to 1968.

The Ninth Circuit ratified the agency's newer, stricter affirmative misrepresentation rule of estoppel. The effect, contrary to this Court's holdings, allows the agency to "unduly intrude upon reasonable reliance interests" of these Petitioners. See, *Heckler v. Community Health Services of Crawford County, Inc., supra* 467 US at 60n.12.

The Ninth Circuit found no duty on behalf of Government officials to act to forewarn these miners of their purported filing or title deficiencies throughout the 60 year history of the Wilson claim. The Ninth Circuit found no need for the District Court to balance competing public policy and private economic interests to determine whether equitable estoppel should be applied to the Government or not.

Upon review, this Court may find that an estoppel rule incorporating both private and public interests would better serve district courts, agencies and parties whose property interests are affected. When estoppel elements are present, the tribunal can proceed to balance the private and public interests in determining whether countervailing public policies necessitate rejection of estoppel against the Government.

## CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Dated: June 15, 1998.

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| GARY HOEFLER, DON WURSTER, CAMERON ANDERSON and ROBIN ANDERSON, Owners of the Placer Wilson Mining Claim, *Plaintiffs-Appellants*, | ) | No. 96-36286 |
| v. | ) | D.C. No. |
| BRUCE BABBITT, Secretary of the Interior; MICHAEL DOMBECK, Acting Director Bureau of Land Management; ELAINE ZIELINSKI, State Director, Oregon Office, Bureau of Land Management; DAN GLICKMAN, Secretary of Agriculture; JACK WARD THOMAS, Chief Forest Service; ROBERT W. WILLIAMS, Acting Regional Forester; MIKE LUNN, Forest Supervisor, Siskiyou National Forest; MARY ZUSCHLAG, District Manager, *Defendants-Appellees*. | ) | CV 93-1427HJF<br>OPINION |

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
March 2, 1998 --- Portland, Oregon

Filed March 20, 1998

Before: Ferdinand F. Fernandez, Pamela Ann Rymer and A. Wallace Tashima, Circuit Judges.

**OPINION**

TASHIMA, Circuit Judge:

Plaintiffs appeal from the district court's grant of summary judgment and dismissal of their claims relating to a decision of the Interior Board of Land Appeals ("IBLA"), which affirmed a decision of the Bureau of Land Management, declaring their mining claim void *ab initio*. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.[1]

We review de novo a grant of summary judgment, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.), *cert denied*, 118 S.Ct. 559 (1997), as well as a dismissal for failure to state a claim. *Lewis v. Telephone Employees*

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[1] The facts are fully set forth in the district court's opinion, *Hoefler v. Babbitt*, 952 F. Supp. 1448 (D.Or. 1996), and we do not repeat them here.

*Credit Union,* 87 F.3d 1537, 1545 (9th Cir. 1996). The existence of subject matter jurisdiction is a question of law reviewed de novo. *Wilson v. A.H. Belo Corp.,* 87 F.3d 393, 396 (9th Cir. 1996). We review decisions of the IBLA under the arbitrary and capricious standard of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2)(A); *Gilmore v. Lujan,* 947 F.2d 1409, 1411 (9th Cir. 1991). Because estoppel is an equitable concept that is invoked by the court in its discretion, we review the district court's rejection of appellants' equitable estoppel argument under the abuse of discretion standard. *See United States v. Ruby Co.,* 588 F.2d 697, 706 (9th Cir. 1978) (Ely, J. dissenting) ("As my Brothers appropriately say, courts remain free to reject the application of estoppel to the Government, even though the required elements are present, when, in the exercise of their equitable discretion, they find that countervailing reasons of public policy so

require."); *see also Scholle Corp. v. Blackhawk Molding Co., Inc.*, 133 F.3d 1469, 1471 (Fed. Cir. 1998) (holding that a district court's finding of equitable estoppel is reviewed under an abuse of discretion standard).

**II.**

Appellants contend that under the Quiet Title Act, 28 U.S.C. §§ 1346 and 2409a, the IBLA should have referred determination of chain of title validity for the 1912 Navajoe mining claim and the 1929 Wilson mining claim to the federal district court. According to appellants, the IBLA's failure to do so violated the APA because it constituted agency action in excess of statutory jurisdiction. *See* 5 U.S.C. § 706 (2)(C). We reject this argument as wholly without merit.

[1] The Department of Interior has plenary authority over the administration of public lands, including minerals on those lands. *Best v. Humboldt Placer Mining*

*Co.*, 371 U.S. 334, 336 (1963). Consequently, "the Department of the Interior has primary jurisdiction to determine the validity of mining claims on public lands." *United States v. Bagwell*, 961 F.2d 1450, 1453-54 (9th Cir. 1992) (citing *Foremost Int'l Tours v. Quantas Airways*, 525 F.2d 281, 286-87 (9th Cir. 1975)); *United States v. Haskins*, 505 F.2d 246, 253 (9th Cir. 1974); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 834 (9th Cir. 1963) ("administrative determination should precede adjudication in the courts"). The Department of the Interior is therefore entrusted with the function of making the initial determination, subject to judicial review, as to the validity of claims against mineral lands. *Bagwell*, 961 F.2d at 1454 (quoting *Adams v. United States*, 318 F.2d 861, 866 (9th Cir. 1963)). The Department is fully empowered to determine whether a claim, such as the one before this Court, is valid and, if it finds the claim invalid, the

Department may declare the claim null and void. *See Best,* 371 U.S. at 337 (quoting *Cameron v. United States,* 252 U.S. 450, 459-60 (1920)).

[2] None of appellants' arguments dents this wall of authority. Cases cited by appellants are inapposite as they address the question of whether the United State *may* seek a determination of the validity of a mining claim in federal court, not whether the Quiet Title Act *commands* it to do so. *See Humble Oil & Ref. Co v. Sun Oil Co.,* 191 F.2d 705, 708 (5th Cir. 1951) (determining whether suit was in equity or at law); *United States v. Mulligan,* 177 F. Supp. 384, 385 (D. Or. 1959) (stating that matters before the court were which issues, if any, should be tried by a jury and whether to bifurcate issues into separate trials). As we held in *Bagwell,* "if the United States determines that the possession of a mining claim is in bad faith, it *may choose* to bring an action in federal court to recover possession of

the public land without first adjudicating the validity of the claim in administrative proceedings." 961 F.2d at 1454 (emphasis added).

Appellants' additional contention that the IBLA failed to follow its prior decisions is unavailing because the cases cited by appellants involve disputes between rival claimants and different statutory provisions.[2]

[3] Neither the Quiet Title Act nor any other statute or regulation provides a procedure for the IBLA to refer a claim determination to the district court. Under the Quiet Title Act, the United States cannot initiate proceedings, it may only be named as a party defendant. *See* 28 U.S.C. § 2409a(a) ("The United States may be named as a party defendant in a civil action under this section to adjudicate a

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[2] Appellants also cite *Shultz v. Department of Army,* 10 F.3d 649 (9th Cir. 1993). That opinion, however, has been withdrawn. See *Schultz v. Department of Army,* 96 F.3d 1222 (9th Cir. 1996), *pet. for cert. filed,* 66 U.S.L.W. 3474 (Jan. 6, 1998) (No. 97-1117-CFX).

disputed title to real property in which the United States claims an interest, other than a security interest or water rights.") Appellants have failed to provide any authority to support their contention that exclusive jurisdiction to determine the validity of unpatented mining claims is vested in the district court pursuant to the Quiet Title Act.

[4] The district court correctly held that this action was properly considered under the APA and not under the Quiet Title Act. The APA is the sole means for challenging the legality of federal agency action unless "a party challenges an agency action as violating a federal law... that has been interpreted as conferring a private right of action, or where a particular regulatory scheme contains a specialized provision for obtaining judicial review of agency actions under the scheme...." *Clouser v. Espy,* 42 F.3d 1522, 1528 n.5 (9th Cir. 1994). Appellants do not fall within either of the above exceptions. Accordingly, the

district court properly dismissed appellants' claim under the Quiet Title Act. The only basis for jurisdiction in this action is under the APA and 28 U.S.C. § 1331. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607-08 n.6 (1978) (holding that subject matter jurisdiction to review Department of the Interior decisions voiding mining claims is conferred by 28 U.S.C. § 1331).

**III.**

We agree with the district court's reasoning and conclusions on all other issues, and affirm the district court for the reasons set forth in its opinion, *Hoefler v. Babbitt*, 952 F. Supp. 1448 (D. Or.1996).

**AFFIRMED.**

# APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| GARY HOEFLER, DON WURSTER, CAMERON ANDERSON and ROBIN ANDERSON, Owners of the Placer Wilson Mining Claim, *Plaintiffs*, | ) | Civil No. |
| v. | ) | 93-1427-FR |
| BRUCE BABBITT, Secretary of the Interior, MICHAEL DOMBECK, Acting Director, Bureau of Land Management, ELAINE ZIELINSKI, State Director, Oregon Office, Bureau of Land Management, United States Department of the Interior, DAN GLICKMAN, Secretary of Agriculture, JACK WARD THOMAS, Chief, Forest Service, ROBERT W. WILLIAMS, Acting Regional Forester, MIKE LUNN, Forest Supervisor, Siskiyou National Forest, MARY ZUSCHLAG, District Manager, *Defendants*. | ) | OPINION |

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FRYE, Judge:

This action arises from a decision of the Interior Board of Land Appeals (the IBLA) declaring the Wilson placer mining claim of the plaintiffs null and void ab initio. The plaintiffs seek review of this decision. Before the court is the motion of the defendants to dismiss (#36-1) and/or for summary judgment (#36-2). The defendants move the court to dismiss the plaintiffs' first claim for quiet title for failure to state a claim; to dismiss the plaintiffs' third claim for an evidentiary hearing; and to deny the plaintiffs' fourth claim to reverse the decision of the IBLA because it is not supported by substantial evidence. The defendants also move for summary judgment against the plaintiffs' second claim in which the plaintiffs seek to have their mining claim recorded.

UNDISPUTED FACTS

On January 13, 1913, Henry and John Brazille filed

a Notice of Placer Location for the Navajoe Placer Mine which they located on December 17, 1912 for an area located near the Illinois River in Josephine County, Oregon.

On September 25, 1929, George C. Wilson filed a Notice of Location of Placer Claim, also for an area located near the Illinois River in Josephine County, Oregon.

On August 29, 1934, James Greig filed an Amended Notice of Location of Placer Claim in Josephine County. Other documents recorded in Josephine County trace the chain of title of the plaintiffs' Wilson placer mining claim back to the Amended Notice of Location of Placer Claim filed by Greig. The owners of the Wilson placer mining claim between Greig and the plaintiffs are O.A. and Margaret Thomas, A.S. Barnes, A. Donley Barnes, Rolland R. Woodford, Conrad Freeman, and Larry O. Farmer. Although no deed was recorded conveying the claim of George C. Wilson to Greig, the survey boundary calls of

the two claims are similar. The defendants do not dispute that the Amended Notice of Location of Placer Claim filed by Greig on August 29, 1934 relates back and applies to the same area as the Notice of Location of Placer Claim filed by George C. Wilson on September 25, 1929. Therefore, the plaintiffs are able to trace the chain of title of their Wilson placer mining claim back to 1929.

There is no recorded deed for any conveyance of the Navajoe placer mining claim from the Brazilles to George C. Wilson. Thus, the dispute between the parties is whether the plaintiffs' Wilson placer mining claim is one and the same claim as the Brazilles' Navajoe placer mining claim. The plaintiffs want to establish this fact so that they are able to trace the chain of title of their Wilson placer mining claim back to 1913.

According to A. Donley Barnes, who owned the Wilson placer mining claim from 1938 until 1967, the

Navajoe placer mining claim and the Wilson placer mining claim are the same claim. Henry and John Brazille built a two-story house shortly after they recorded the Navajoe placer mining claim in 1913. Barnes lived in this house from 1938 until 1967 and used some of the improvements, including a woodshed, which Barnes believes was constructed by Henry and John Brazille, and a water source. According to Barnes, Henry and John Brazille owned the Navajoe placer mining claim from the time that they originally located the placer mine in 1912 to the time that they sold it to George C. Wilson in 1929. Barnes' memory of the sale from the Brazilles to George C. Wilson, however, was vague. John Brazille worked for Barnes and helped Barnes restore the corner monuments of the Wilson placer mining claim. Barnes stated that when he purchased the Wilson placer mining claim in 1938, he intended to acquire ownership of the buildings and of the filing relating

back to the original claim located by Henry and John Brazille in 1912 and recorded in 1913. John Brazille told Barnes that title to the Wilson placer mining claim related back to the original claim located in 1912. Both Henry and John Brazille and George Wilson died before the IBLA issued its decision declaring the Wilson placer mining claim null and void ab initio.

The land in the area in which both the Wilson and Navajoe claims are found, whether those claims are the same or merely near each other, was withdrawn from mineral entry from January 7, 1926 until August 11, 1955 by Powersite Location No.123. The Mining Claim Rights Restoration Act (the MCRRA), 30 U.S.C. § 623, provides that within one year after August 11, 1955, an owner of unpatented mining claims located on land withdrawn for powersite locations can file a copy of the Notice of Location of the mining claim. Barnes filed a copy of

Greig's 1934 Amended Notice of Location of the Wilson placer mining claim on August 13, 1956. The Wilson placer mining claim was withdrawn from location and entry under the mining laws when the Wild and Scenic Rivers Act was enacted on October 2, 1968 and remains withdrawn from location to the present.

On August 2, 1989, the Bureau of Land Management (the BLM) sent the plaintiffs a notice requesting additional evidence of their assertion of title to the Wilson placer mining claim. In June of 1990, the BLM determined that the plaintiffs had failed to provide proof that the Wilson placer mining claim was, in actuality, the Navajoe placer mining claim located on December 17, 1912 when the lands were open to mineral entry. The IBLA affirmed the decision. *Hoefler*, 27 IBLA 211 (1993).

CONTENTIONS OF THE PARTIES

The plaintiffs contend that the Wilson placer mining

claim is valid for three reasons: (1) the Wilson placer mining claim is the same claim as the Navajoe placer mining claim which was located when the land was open to mineral entry; (2) the filing by Barnes on August 13, 1956 of a copy of Greig's 1934 Amended Notice of Location of the Wilson placer mining claim under the MCRRA validated the claim; (3) the plaintiffs are entitled to the Wilson placer mining claim by adverse possession under 30 U.S.C. § 38 because for more than ten years -- from 1955 to 1968, when the land was open to the public for mineral entry -- they possessed it.

The plaintiffs contend that this court has jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a, to review material not contained in the administrative record; that the decision of the IBLA is not supported by substantial evidence; that they are entitled to an evidentiary hearing before the Secretary of the Interior; and that the doctrine of

equitable estoppel acts to make valid the Wilson placer mining claim.

On the merits, the defendants contend that the record does not support the argument of the plaintiffs that the Wilson placer mining claim and the Navajoe placer mining claim are one and the same; that the filing by Barnes of a copy of the 1934 Amended Notice of Location of the Wilson placer mining claim on August 13, 1956 was filed two days too late to afford the plaintiffs relief under the MCRRA; and that the plaintiffs cannot rely on the doctrine of adverse possession because they did not record a "holding and working" claim as required by Section 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744.

Procedurally, the defendants contend that the proper standard of review is whether the decision of the IBLA was arbitrary and capricious, an abuse of discretion, or

otherwise not in accordance with the law.

The defendants contend that the plaintiffs are not entitled to an evidentiary hearing because the plaintiffs have no property rights in the invalid Wilson placer mining claim, and there is no additional evidence to be presented. The defendants also contend that the remedies of the plaintiffs are confined to the remedies provided by the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq (the APA), and not the remedies provided by the Quiet Title Act, 28 U.S.C. § 2409a (the QTA).

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will only be granted if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). The review is limited to the complaint, and all

allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 737 (9th Cir. 1987).

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

## ANALYSIS AND RULING

1. Quiet Title

The initial question is whether the plaintiffs are limited to the remedies provided by the APA, or whether they may alternatively seek relief under the QTA.

The QTA allows a plaintiff to name the United States as a defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The defendants contend that the United States claims no interest in the Wilson placer mining claim. The defendants argue that because the Wilson placer mining claim is unpatented,[1] the

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[1] An unpatented claim is a possessory interest in land solely for the purpose of mining. The government or a private party may contest an unpatented claim. gets a fee simple interest from the United States in a patented claim, and no one can contest the claim *Clouser v. Epsy,* 42 F.3d 1522, 1525 n.2 (9th Cir, 1994), cert denied, __U.S__, 115 s.Ct. 2577 (1995).

United States has title to the land and therefore has the power to determine whether a claim such as the plaintiffs' is valid and, if not, to declare it null and void. The defendants characterize the issue as whether the property interest in the form of the mining claim even exists, and not as who owns the title to the property interest. The defendants further argue that a placer mining claim cannot be validated unless the Department of Interior determines that the claim incorporates the discovery of a valuable mineral. This has never been determined for the Wilson placer mining claim. Thus, this court should not quiet title in the Wilson placer mining claim.

The plaintiffs argue that the QTA applies to estates with less than a fee simple interest, including an unpatented mining claim. The plaintiffs concede, however, that the Forest Service has jurisdiction to initiate proceedings to determine if a valuable mineral exists in the unpatented

mining claim.

The plaintiffs cite several cases in support of their contention that the United States can claim an interest in mining claims: in *Downstate Stone Co. v. United States*, 651 F.2d 1234 (7th Cir. 1981), the plaintiff sued the United States under the QTA to enforce its right to quarry limestone pursuant to a reservation of mineral rights on land which it had sold to the United States; in *Amoco Prod. Co. v. United States*, 619 F.2d 1383 (10th Cir. 1980), the plaintiff sued the United States to quiet title to a mineral interest reserved when the predecessor in interest to the United States conveyed the property. The cases cited by the plaintiffs revolve around mineral interests reserved when land is sold. None of these cases concern a mining claim or opposition to a decision of the IBLA as to the validity of a mining claim. The plaintiffs cite no case in which a plaintiff is allowed to use the QTA to challenge a decision

of the IBLA to invalidate a mining claim.

As stated in *Clouser v. Espy*, 42 F.3d 1522, 1528 n.5 (9th Cir. 1994), cert. denied, __U.S.__, 115 S.Ct. 2577 (1995):

> [T]he APA is a framework statute that provides the generally applicable means for obtaining judicial review of actions taken by federal agencies. Generally, except where a party challenges an agency action as violating a federal law -- be it a statute, regulation, or constitutional provision -- that has been interpreted as conferring a private right of action, or where a particular regulatory scheme contains a specialized provision for obtaining judicial review of agency actions under the scheme, review under a framework statute such as the APA is the sole means for testing the legality of federal agency action.

The plaintiffs do not fall within the exceptions noted by the court in *Clouser*. Consequently, the only remedy available to the plaintiffs is through the APA. The motion of the defendants to dismiss the first claim of the plaintiffs for quiet title is granted.

2. Standard of Review by this Court of a Decision of the IBLA

The plaintiffs argue that the standard of review of a decision of the IBLA is whether the decision of the IBLA is supported by substantial evidence. The defendants argue that because the IBLA did not conduct an adjudicatory hearing, the standard of review of its decision is whether the decision is "arbitrary and capricious."

The APA contains the following standards of review:

> The reviewing court shall --
>
> ....
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> ....

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [hearings] or otherwise reviewed on the record of an agency hearing provided by statute; or

....

5 U.S.C. § 706.

The plaintiffs contend that their due process rights entitle them to an evidentiary hearing, although they do not cite any statute that requires that the validity of a mining claim be determined in an evidentiary hearing. If an informal hearing is held before the IBLA or required pursuant to a regulation but not pursuant to a statute, the appropriate standard is whether the decision of the IBLA is "arbitrary and capricious" under 5 U.S.C. § 706(2)(A). *Castillo v. Army & Air Force Exch. Serv.*, 849 F.2d 199, 203 n.1 (5th Cir. 1988) ("arbitrary and capricious" test used

when hearing was pursuant to regulation and not statute). "Determinations by ... the IBLA must be upheld unless arbitrary, capricious, an abuse of discretion, or not in accordance with law." *Gilmore v. Lujan*, 947 F.2d 1409, 1411 (9th Cir.1991) (internal quotations omitted).

The standard of review here is whether the review of the decision of the BLM by the IBLA was arbitrary, capricious, an abuse of discretion, or not in accordance with law. Accordingly, the plaintiffs' fourth claim to reverse the IBLA's decision because it is not supported by substantial evidence is dismissed for failure to state a claim.

3. Entitlement to an Evidentiary Hearing

The plaintiffs contend that their right to due process of law requires that an evidentiary hearing be held before the IBLA. The plaintiffs seek to present testimony relating to the ground monuments marking the Wilson placer mining claim and the transfer of ownership in the form of

conveyances, as opposed to the Notices of Location. The plaintiffs argue that the only facts considered by the IBLA were those facts adduced from the Notice of Location instruments that were recorded. The plaintiffs argue that an on-site survey is required. The plaintiffs contend that the failure of the IBLA to use the procedure necessary to enable them to meaningfully determine the conduct of the Forest Service and of the BLM while investigating the on-site boundaries and monuments from the 1950s through 1965 is the essence of their due process concerns.

The defendants argue that the plaintiffs are not entitled to an evidentiary hearing because the plaintiffs have no property rights upon which to base a due process claim. Further, the defendants argue that the IBLA denied the request of the plaintiffs for an evidentiary hearing after reviewing the deposition testimony of Barnes. The IBLA noted that "the record that we have concerning these old

placer claims is as complete as it is ever likely to be." *Hoefler*, 27 IBLA at 215.

When the BLM asked the plaintiffs for additional evidence of title, the plaintiffs provided the deposition testimony of Barnes. The plaintiffs do not explain why they could not have provided to the BLM the evidence that they wish to present now through documents and photographs, including the deposition testimony of others as well as the deposition testimony of Barnes. Detailed administrative procedures can be sufficient due process, particularly when there is no evidence that the plaintiffs are unable to comprehend the administrative procedures and thus require an evidentiary hearing to assist them in presenting evidence. *Clouser*, 42 F.3d at 1540 ("As here there is no record evidence showing, nor reason to believe, that holders of mining claims are similarly unable to pursue their claims by filing written pleadings.") The court finds

that the due process rights to which the plaintiffs are entitled do not include the right to an evidentiary hearing, before this court. The plaintiffs' third claim for an evidentiary hearing will be dismissed.

4. Mining Claim Validity

The defendants move for summary judgment against the plaintiffs' second claim in which the plaintiffs seek to have the Wilson mining claim recorded. The plaintiffs make four arguments in support of their claim. Again, the court will review the decision of the IBLA to determine whether it is a decision that is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

a. Identity of Wilson and Navajoe Claims

An order withdrawing land from mining entry invalidates any mining location made while the order

remains operative. *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 444 (9th Cir. 1971). The defendants concede that the plaintiffs' chain of title relates back to September 25, 1929, when George Wilson filed a Notice of Location of Placer Claim. The land in the area was withdrawn from mineral entry from January 7, 1926 until August 11, 1955. Thus, the plaintiffs must prove that the Wilson placer mining claim is the same claim as the Navajoe placer mining claim, which was located in 1912 and recorded in 1913 before the land within the claim was withdrawn from mining entry.

The plaintiffs argue that the George Wilson filing on September 25, 1929 and the Greig filing on August 29, 1934 operate as amended Notices of Location of Placer Claim. The plaintiffs argue that these two Notices of Location of Placer Claim were filed by George Wilson and Greig to show that they intended to and did convey their

interests to the grantees who filed the 1929 and 1934 Notices of Location of Placer Claim, notwithstanding the fact that the two deeds were not recorded. The plaintiffs also rely on the testimony of Barnes, who states that he intended to purchase the buildings and to make the filings necessary to relate back to the original claim that was located in 1912. Ex. 31 at 18. Barnes also stated that the Brazilles owned the claim "up to the time they sold it, and I suppose to Mr. Wilson." Ex. 31 at 16. Barnes lived in the house built by the Brazilles. Ex. 31 at 9.

The IBLA studied the documents and concluded that the documents do not connect the Navajoe and the Wilson claims. A comparison of the survey calls in the Notices of Location for the Navajoe and the Wilson claims shows that the Notice of Location for the Navajoe claim has an illegible word in the copy that is in the administrative record. Ex. 1. Because the other three calls are northerly,

southerly and westerly, the illegible word must be "easterly" in order to form a closed rectangle for the claim. Comparing this to the 1929 and the 1934 Notices of Location for the Wilson claim, and assuming that stake one would be in the same location if the Navajoe and the Wilson claims were the same and the notices were amendments as the plaintiffs contend, the claims cannot be for the same land. They must be for contiguous land.

The IBLA reviewed the testimony of Barnes, but determined that the facts to which he testified were too vague to establish with reasonable certainty that the claims were for the same land. The IBLA also noted the existence of a Mineral Claims Occupancy Report dated May 20, 1965 (Ex. 2), which states that the claims may have an unbroken line of ownership dating from 1912 based on two unrecorded quitclaim deeds from Brazille to George Wilson and from George Wilson to Greig.

The administrative record contains a document entitled "Decision Notice, Wilson Placer Claim" dated April 16, 1980, which includes this statement: "My decision is based on the fact that this is a reasonable exercise of a miner's rights. The claim is valid." Ex. 26B. The Decision Notice references an Environmental Assessment Report which is not a part of the administrative record. The plaintiffs obtained the Environmental Assessment Report during the course of this litigation. The Environmental Assessment Report, dated April 14, 1980, and prepared by Greg R. Schimke, a minerals technician with the Forest Service, states, in part:

> On April 2, 1980, I traced the history of the Wilson Placer claim in the Josephine County Recorder's office. The claim was originally filed on 12/17/12 and has had an unbroken chain of ownership to the present owners. Annual assessment work has been kept up since the withdrawal went into effect.

Appendice No. 4 to Plaintiffs' Response to Defendants'

Reply Memorandum Regarding Defendants' Motion to Dismiss and for Summary Judgment, p.3. Although the Environmental Assessment Report was referenced in the administrative record, it is not formally a part of the record and the IBLA never saw it.

Generally, review of agency action is limited to the administrative record. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993). However, this general rule is subject to several exceptions which permit this court to review evidence outside of the administrative record:

> (1) if necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," or (3) "when supplementing the record is necessary to explain technical terms or complex subject matter." A fourth circumstance occurs "when plaintiffs make a showing of agency bad faith."

*Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d

697, 703-04 (9th Cir. 1996) (quoting *Friends of the Payette,* 988 F.2d at 997; and *National Audubon Soc'y v. United States Forest Serv.,* 46 F.3d 1437, 1447 n.9 (9th Cir. 1993)). Recently, the United States Court of Appeals for the Ninth Circuit permitted extra-record evidence because the evidence assisted the court regarding highly technical matters. *Inland Empire Pub.Lands Council v. United States Forest Serv.,* 88 F.3d 754, 760 n.5 (9th Cir. 1996) ("the court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration...because it will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have

considered but did not." (Internal quotations omitted)).

None of the exceptions apply here. The IBLA reviewed all of the relevant documents and other evidence, such as the Barnes deposition, and carefully explained why the evidence did not support a conclusion that the Navajoe placer mining claim and the Wilson placer mining claim were the same claim. There is no evidence that the IBLA considered any documents not in the administrative record. The subject matter here, documents establishing a chain of title, is not so highly technical that the record must be supplemented to either explain it or for this court to determine if the IBLA considered all relevant factors. Furthermore, the Environmental Assessment Report does not provide any further explanation of any technicalities. The court does not see evidence of bad faith on the part of the defendants. At most, they did not point out problems with the validity of the Wilson placer mining claim as early

as the plaintiffs would have preferred. This does not amount to bad faith because there is no evidence that the defendants withheld information from the plaintiffs. At most, they did not gather it quickly enough.

The administrative record does contain the Mineral Claims Occupancy Report, discussed above, which states that the claim may have an unbroken line of ownership dating from 1912. This is essentially the same information as that contained in the Environmental Assessment Report. Thus, the Environmental Assessment Report does not address information not already in the record. *See Rybachek v. United States EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990). The court declines to supplement the administrative record with the Environmental Assessment Report.

The conclusion of the IBLA that the Navajoe placer mining claim and the Wilson placer mining claim are not

discretion, or not in accordance with law.

b. Adverse Possession

An alternative way for a miner to establish a claim is by holding and working the claim for a period of time equal to that required under state law for the statute of limitations for adverse possession of mining claims. 30 U.S.C. § 38. In the State of Oregon, the period is ten years. O.R.S. 12.050.

The original 1872 Mining Law required compliance with local recording requirements, but did not require a notice of a mining claim to the federal government. To allow the federal land managers an easy way of discovering which federal lands are subject to mining claim locations, Congress passed the Federal Land Policy and Management Act § 314, 43 U.S.C. § 1744 (the FLPMA). It requires owners of unpatented mining claims located prior to

October 21, 1976, to file certain instruments with the BLM within the three year period following October 21, 1976, and prior to December 31 of each year thereafter. Failure to file the instruments is deemed conclusively to constitute abandonment of the claim.

The IBLA has consistently held that the filing requirements of the FLPMA § 314 apply to all who submit holding and working claims under 30 U.S.C. § 38. *See Sayer*, 42 IBLA 296, 299-300 (1979); *Heady*, 110 IBLA 245, 247 (1989). The Ninth Circuit upheld the IBLA's construction of 30 U.S.C. § 38 as requiring all filings specified in FLPMA § 314 in *Webb v. Lujan*, 960 F.2d 89, 93 (9th Cir.1992). The information in the filings is to include at a minimum:

> (1) the name under which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants; (3) an adequate

> description of the claim; (4) type of claim; (5) information concerning the time of the state's statute of limitations and a statement by the claimant as to how long the claim has been held and worked, giving, if possible, the date (or at least the year) of the origin of the claimant's title and facts as to continuation of possession of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes.

*Sayer*, 42 IBLA at 302-03; *Webb*, 960 F.2d at 94.

The plaintiffs cite *United States v. Haskins*, 505 F.2d 246, 250 (9th Cir. 1974), for their statement that 30 U.S.C. § 38 allows miners to assert valid placer locations "without proof of posting, recording notices of location and the like." *Haskins* was decided before the passage of the FLPMA § 314, however, and thus does not discuss how the two laws should be construed together. It is not dispositive here.

In 1979, the predecessors in interest of the plaintiffs

filed with the BLM a copy of the Amended Notice of Location of Placer Claim originally filed by Greig in 1934. This document, however, does not contain all of the information required by the FLPMA and described in *Webb*. As in *Webb*, the predecessors in interest of the plaintiffs failed to file a document sufficient to identify the type of claim with any degree of particularity and thus fulfill the goals of the FLPMA. Furthermore, no filings were made in successive years, as required by the FLPMA. The court concludes that the plaintiffs cannot validate the Wilson placer mining claim by the doctrine of adverse possession because of the failure to record a proper holding and working claim.

c. Mining Claim Rights Restoration Act

The Mining Claim Rights Restoration Act (the MCRRA) allows owners of unpatented mining claims located on land withdrawn from mineral entry for power

purposes to file a copy of the notice of location of the claim within one year after August 11, 1955. 30 U.S.C. § 623. Courts have strictly construed filing requirements found in other federal mining laws. *See United States v. Locke*, 471 U.S. 84, 100-01 (1985) (missing the annual filing required by the FLPMA by one day was untimely and resulted in abandonment of the mining claim).

Barnes filed a copy of Greig's 1934 Amended Notice of Location of the Wilson placer mining claim on August 13, 1956, two days after the deadline passed. This filing was untimely and cannot validate the claim. Thus, it is not necessary for the court to determine what rights the plaintiffs might have been afforded by the MCRRA. See S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1995 U.S.C.C.A.N. 3006 ("the language of [the MCCRA] as reported by the committee does not validate locations or claims based on entry after public lands have been

withdrawn or reserved for power development and prior to restoration").

d. Equitable Estoppel

To estop the United States, the government's conduct supporting the estoppel must include affirmative misconduct, defined to be an affirmative misrepresentation or affirmative concealment of a material fact. *United States v. Ruby Co.*, 588 F.2d 697, 702-03 (9th Cir. 1978) (Interior Department did not engage in affirmative misconduct when it decided not to resurvey land until 34 years after the BLM recommended a resurvey because the original survey appeared fraudulent), cert. denied, 442 U.S. 917 (1979). The misconduct must go beyond "mere negligence" and must amount to "ongoing active misrepresentations" or a "pervasive pattern of false promises." *Stone Forest Indus. v. Robertson*, 936 F.2d 1072, 1075 (9th Cir. 1991).

The plaintiffs contend that the defendants had three

opportunities to inform them of a problem with the validity of the Wilson placer mining claim: (1) after the filing by Barnes of Greig's 1934 Amended Notice of Location of the Wilson placer mining claim on August 13, 1956; (2) in 1965 when the Forest Service issued the Mining Claim Occupancy Report; and (3) in 1980 when the Forest Service approved a plan of operations. The plaintiffs contend that the defendants should have investigated and made a final validity determination at those times when they gave some attention to the Wilson placer mining claim. The court concludes that the failure to inform the plaintiffs of the validity problems at an earlier date does not amount to ongoing active misrepresentations. There is no evidence that the defendants had information that they were withholding from the plaintiffs. Accordingly, the court concludes that the defendants are not estopped from declaring the Wilson placer mining claim null and void ab

initio.

e. Summary on Mining Claim Validity

For the reasons above, none of the arguments of the plaintiffs that the Wilson placer mining claim is valid have merit. Accordingly, the court affirms the decision of the IBLA declaring the Wilson placer mining claim null and void ab initio.

CONCLUSION

The motion of the defendants to dismiss claim one for quiet title, claim three for an evidentiary hearing, and claim four to reverse the decision of the IBLA because it is not supported by substantial evidence (#36-1) is granted. The motion of the defendants for summary judgment against the plaintiffs' amended complaint, including claim two in which the plaintiffs seek to have their mining claim recorded. (#36-2) is granted. This disposes of all of the claims of the plaintiffs. The court will enter a judgment.

Dated this 7 day of October, 1996.

Helen J. Frye

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
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| GARY HOEFLER, et al<br>*Plaintiffs*,<br>v.<br>BRUCE BABBITT, et al<br>*Defendants*. | ) | Civil No.<br>93-1427-FR<br><br>ORDER |

FRYE, Judge:

IT IS HEREB ORDERED that the motion of the defendants to dismiss claim one for quiet title, claim three for an evidentiary hearing, and claim four to reverse the decision of the IBLA because it is not supported by substantial evidence (#36-1) is GRANTED; and the motion of the defendants for summary judgment against the plaintiffs' amended complaint, including claim two in which the plaintiffs seek to have their mining claim recorded (#36-2) is GRANTED. This disposes of all of the claims of the plaintiffs. The court will enter a judgment.
DATED this 7 day of October, 1996.

Helen J. Frye,
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| GARY HOEFLER, et al<br>*Plaintiffs*,<br>v.<br>BRUCE BABBITT, et al<br>*Defendants*. | ) | Civil No.<br>93-1427-FR<br><br>JUDGMENT |

IT IS HEREBY ORDERED AND ADJOURNED that judgment is entered in favor of the defendants and against the plaintiffs.

DATED this 7 day of October, 1996

Helen J. Frye
United States District Judge

# APPENDIX C

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

GARY HOEFLER ET AL.

IBLA 90-428 Decided September 14, 1993

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring a placer mining claim null and void ab initio. ORMC-19689.

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APPEARANCES: Roger F. Dierking, Esq., and Philip Schuster, Esq., Portland, Oregon, for Gary Hoefler, Don Wurster, Cameron Anderson and Robin Anderson; Roger W. Nesbit, Esq. Office of the Solicitor, Pacific Northwest Region, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Gary Hoefler, Don Wurster, Cameron Anderson, and Robin Anderson have appealed from a June 6, 1990,

decision of the Oregon State Office, Bureau of Land Management (BLM), declaring the Wilson placer mining claim, ORMC-19689, null and void ab initio because the land on-which it was located was withdrawn from location or entry on January 7, 1926, as part of Power-site Classification No. 123.

The BLM decision found that appellants had failed to provide proof that the Wilson claim was "in actuality the Navajoe Placer Mine located December 17, 1912, * * * at the time when the lands were open to mineral entry." This finding related to a notice sent by BLM to appellants on August 2, 1989, that additional evidence of title was required to establish the validity of their Wilson claim located in the Siskiyou National Forest on the Illinois River in the NW¼, sec. 3, T. 38 S., R . 9 W., Willamette Meridian, Josephine County, Oregon. BLM pointed out that the location notice provided by appellants on

September 10, 1979, indicated the claim was located in 1934 within an area closed to mining by a powersite withdrawal. BLM observed that if, as appellants had stated earlier, the 1934 location was an amendment of a 1912 location, evidence of that fact should be provided. Appellants then provided additional information concerning the claim, which was submitted by BLM to the Office of the Regional Solicitor. When the additional title documents were furnished, counsel for appellants for the first time raised the possibility that 30 U.S.C. § 38 (1988), a savings clause of the mining law, would be relied upon by appellants to establish that they had held and worked the claim for the requisite length of time while the land was open to mineral entry so as to support their claim. See letter from Dierking to BLM dated Aug. 25, 1989.

A Solicitor's opinion evaluated the arguments and documents submitted by appellants to BLM to establish the

genesis of their claim in 1912 and concluded that no connection between the 1934 amended location of claim and the 1912 claim had been made. See Wilson Placer Claim (ORMC 19689) Title Opinion dated May 2, 1990, at 3, 4, and 5. Also considered by the opinion was whether, while the land at issue was open to mineral location between 1955 and 1968, a possessory right was acquired within the contemplation of provisions of 30 U.S.C. § 38 (1988) by persons working and holding the claim for the period of the Oregon statute of limitations governing mining claims. The opinion also considered the effect of the Mining Claims Rights Restoration Act of 1955 (MCRRA), 30 U.S.C. § 621 (1988) and arguments raised by counsel for appellants concerning estoppel and laches.

Arguments concerning the effect of section 38, equitable estoppel, and laches have been repeated on appeal by counsel for appellants, although the decision under

review does not refer to 30 U.S.C. § 38, nor does it address possible possessory rights acquired by appellants during the period 1955 through 1968 or before 1926. Here, as was the case in *Steven R. Heady*, 110 IBLA 245 (1989), although the appellants wish to expand the scope of our review beyond the actual decision issued by BLM, we must confine ourselves to that which was decided by BLM. In this case BLM simply found that appellants had, for the purpose of continuing the existence of their Wilson claim pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), filed a location notice for a 1934 claim that was invalid when made because it was located on lands that were withdrawn from mining by a powersite reservation. The June 1990 BLM decision rejected the argument that the filing made by appellants gave notice that the Wilson claim was actually an earlier claim located in 1912 before the

powersite withdrawal.

In their statement of reasons (SOR), appellants argue that the June 6, 1990, BLM decision was in error because first, evidence offered to BLM by appellants established that the amended Wilson claim, filed in 1934, related back to the 1912 Navajoe claim through a series of mesne conveyances that included a 1929 location of a placer claim made by George Wilson that was amended in 1934 (SOR at 10-13). Second, appellants contend that if the Wilson claim cannot be related back to the 1912 location in order to avoid the effect of the powersite withdrawal made in 1926, then they and their predecessors in interest worked and occupied the claim in exclusive adverse possession for more than 10 years when the land was open to mineral entry between 1955 and 1968, a circumstance that entitles them, under provision of 30 U.S.C. § 38 (1988), to a finding that the Wilson claim is

valid.[1] Finally, they contend that the United States is estopped to deny the validity of their claim under the

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[1] Section 4 of MCRRA, 30 U.S.C. § 623 (1988) provided that within 1 year after Aug.11, 1955, owners of unpatented mining claims located on land withdrawn for power purposes were required to file for record with the United States land office a copy of the notice of location of the claim. On Aug. 13, 1956, Barnes filed a copy of the location notice for the amended Wilson claim for record pursuant to the 1955 Act. For reasons described in detail in United States v. Browne, 124 IBLA 247, 250-251 (1992), this tardy filing did not, by itself, invalidate his attempt to claim lands previously withdrawn from mining for placer mining purposes. On Oct. 2, 1968, the land on which the Wilson claim was located was again withdrawn from mineral location and entry under the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1278 (1988), to permit evaluation of part of the Illinois River as a potential component of the Wild and Scenic Rivers System. Pursuant to this withdrawal, on Oct. 19, 1984, Congress designated the Illinois River segment involving the Wilson Claim as a component of the National Wild and Scenic Rivers System, including all lands within ¼ mile of the riverbank from the Siskiyou National Forest boundary to the Rogue River confluence. See P.L. 98-494. Nonetheless, the June 1990 decision here under review made no finding concerning activity at the claim during the 1955-1968 period. The decision confined itself to the question whether recordation of the 1934 amended Wilson claim was effective to preserve the claim under FLPMA section 314. Of necessity our review is similarly limited.

doctrines of equitable estoppel and laches, because of agency inaction and delay in the handling of their claim documentation. Appellants request a hearing to permit them to prove these allegations, and argue that their claims of adverse possession, equitable estoppel, and laches raise issues of fact that can only be resolved by fact finding, concluding that due process requires an evidentiary hearing in this case. In support of their arguments on appeal and request for hearing they have offered 31 exhibits, including a deposition taken on July 24, 1990, from one of their predecessors in interest. For reasons explained below, the request for hearing is denied and the June 1990 BLM decision is affirmed.

The documents provided by appellants establish a chain of title to the claim extending from the present back to October 13, 1937, when James Greig conveyed the claim to O.A. Thomas. Although there are records statements by

Forest Service staff members that indicate they believe there was an unrecorded transfer of the Navajoe Placer Mine to the locator of the Wilson Placer Claim (located by George Wilson on September 3, 1929, no such deed has been furnished, nor have appellants offered the testimony of any of the persons said to have been involved in such an unrecorded transfer to establish that the document ever existed. A similar hiatus exists between George Wilson, who originally located the Wilson Placer Claim in 1929, "about 11 miles down the Illinois river from Selma Ore" and James Greig, the locator of the 1934 claim by the same name which he reported was to be found in "Sec. 3, Tw 37 So. R. 9 West." Although the records furnished on appeal indicate that the Greig location notice probably intended to report that the amended Wilson claim was in township 38 (where the Illinois River runs) rather than in township 37 (where it does not) there is, nonetheless, no clear indication

on the record before us that the 1929 Wilson claim and the 1934 amendment of that claim covered the same ground or that there ever was a transfer of the 1929 Wilson placer by George Wilson to anyone. The documentary chain of title provided by claimants therefore begins with the amended claim located by Greig in 1934.

The only evidence offered to connect ownership of the two Wilson claims together is that provided by the 1990 deposition of Albert Donley Barnes (Exhibit 31), who testified that he and his father purchased the Wilson Placer Claim "sometime in the thirties" (Deposition (Dep.) at 6). The claim had a two-story house on it that he used on weekends with his family (Dep. at 8). The house was the same house built in 1913 by the "Brazil boys" (Dep. at 9). The record before us includes a deed to Barnes and his wife, mother, and father, dated December 8, 1938, from O. A. and LaBlanche Thomas of the "Wilson Placer Mining

Claim situated in Illinois Mining District, amended notice of which is recorded at page 47 of Volume 35, Mining records of Josephine County." In response to a question whether he recalled "checking out the title and ownership of the claim" Barnes replied that he "didn't think it was necessary" (Dep. at 19). He purchased the claim from Owen Thomas (Dep. at 19). His testimony does not explain why the original claimants of the 1929 Wilson and 1929 Navajoe claims could not be questioned concerning the allegedly missing transfers. Nonetheless, counsel for BLM comments in his response brief, and appellants do not deny, that the original locators of the Navajoe and Wilson claims are all dead. On the record before us, therefore, there is nothing to connect ownership of the Navajoe Placer Mine or the 1929 Wilson Placer Claim to the 1934 amendment of that claim (and thereby to appellants), other than the testimony of Albert Barnes that Johnie and Henry

Brazille were the original locators of the claim who built a two-story house on the land now covered by the Wilson claim (Dep. at 9-10, 16) and the Forest Service Mineral Claims Occupancy Report, dated May 20, 1965, that indicated Henry Brazille at some time transferred the claim by quitclaim deed to George Wilson (Exh. 2 at 2; see also Dep. at 16). No document appears in the record to connect the claims.

Barnes also testified concerning the location of the placer claims on the ground. Because the description of each of the three claims is given in relation to markers established on the ground by the miners, it is not possible to determine by examination of the two location notices whether descriptions provided for the Navajoe and the 1934 amendment of the Wilson claim suggest the existence of adjacent claims sharing a common central boundary (after an initial call to the north to corner 2 from a point of

beginning, the Navajoe claim runs east, while the amended Wilson runs west from the second corner call). All that can reasonably be determined on the record before us, therefore, is that all three claims were placer claims of 20 acres that were located on the north bank of the Illinois river by different locators in 1912, 1929, and 1934. At several unspecified times, Barnes stated in his 1990 deposition, in the company of Johnie Brazille, he went to "check on or restore the corner monuments of the Wilson claim" (Dep. at 16). When he did so, he "restored the old original location corners * * * where [Johnie] marked them" (Dep. at 17). Although it is not clear whether the boundaries so marked were believed to be the boundaries of the 1934 or the 1929 or 1912 claims, Barnes concluded that they were coterminous with the Navajoe Placer Mine markers, although the basis for his belief rested entirely on his acquaintance with Johnie Brazille, who he knew as one of

the two original locators of the Navajo Placer Mine. It was not explained if Brazille had located the original corners of all three claims or whether he was present when all three were located (see Dep. at 19). The testimony of Barnes on this crucial point is too vague to establish with reasonable certainty that the Navajoe and Wilson claims were coterminous, although it is clearly offered for that purpose. In the context in which it is offered, however, his testimony does establish that the record that we have concerning these old placer claims is as complete as it is ever likely to be.

[1] Appellants argue that their claim originated in 1912 and therefore remained unaffected by the 1926 powersite withdrawal, contrary to the conclusion reached by BLM. Consequently, they must be prepared to establish the fact of their contention concerning title: they must establish that their claim on land segregated from mineral entry was actually an amendment of a prior location made

while the land was open to mineral location. *Russell Hoffman (*On Reconsideration), 87 IBLA 146, 148 (1985). To satisfy that burden in this case, appellants must show that they have an unbroken chain of title from the original Navajoe Placer Mine Claim. *See Grace P. Crocker,* 73 IBLA 78, 80 (1983), and cases cited therein. The exhibits they have offered, however, indicate that their contentions cannot be established, because the chain of title that they are able to prove for their Wilson claim does not connect it to the 1912 Navajoe Placer Mine. We therefore conclude that BLM correctly determined that appellants had failed to show that the Navajoe Placer Mine and the Wilson claim were the same entity. Appellants have not shown otherwise.

[2] In the alternative, appellants rely on the provisions of 30 U.S.C. § 38 (1988) to argue that there is proof of holding and working the claim for 10 years, the

length of the applicable Oregon statute of limitations, during the period 1955 through 1968 so as to support the establishment of a valid location. We need not explore that allegation, however, because even if that were so, there is no evidence that appellants or their predecessors in interest properly recorded any claim with BLM in reliance on section 38, as required by section 314 of FLPMA, 43 U.S.C. § 1744 (1988). See Steven R. Heady, supra at 248. Assuming appellants' predecessors in interest held and worked the Wilson placer claim for the requisite period, there is no evidence of recordation of any claim in reliance on section 38. Although the 1934 location of the Wilson placer claim was properly recorded with BLM in 1979, as noted above, that claim was properly declared null and void ab initio because it was located at a time when the lands were withdrawn from location by the powersite classification.

At any rate, appellants assert they have relied on the lack of prior objection concerning title to the claim from either BLM or the Forest Service to their detriment, and that the United States should be equitably estopped to deny the validity of the claim after allowing so much time to pass before giving notice of the defective filing. They also contend that any defects in their chain of title have been cured by their adverse possession of the property, and that curative action to perfect their title can he taken if it has not already been accomplished. They say nothing, however, about how they expect to be able to make the required filing of their claim, which they allege was perfected before 1976, within the time allotted by Departmental regulation 43 CFR 3833.1-2(a), which requires such filings to be made before October 22, 1979. It is clear that the time to do so has passed.

Appellants do not allege, moreover, that any official

of the Government actively deceived them in any way, nor do they point to any law that would have required Federal employees to have handled their claim documents otherwise than they were handled in this case. As was pointed out in Paul Vaillant, 90 IBLA 249, 251 (1986), "BLM does not have a duty to immediately determine the legal status of every claim filed with the agency and to notify claimants of its conclusions." The arguments advanced by appellants concerning estoppel and laches also mistakenly assume such a duty to exist, and must fail because of that same error. Insofar as concerns the arguments raised by appellants about the perceived effect of section 38 on activities in the vicinity of the claim between 1955 and 1968, those matters are not before us because they were not decided by the decision here under review.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,

43 CFP 4.1, the decision of the Oregon State office is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris, Deputy Chief Administrative Judge

# APPENDIX D

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be... deprived of life, liberty, or property, without due process of law;

STATUTORY PROVISIONS (U.S.C. 1988 ed.)

**5 U.S.C. § 706** To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency actions. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts to it cited by a party, and due account shall be taken of the rule of prejudicial error.

**28 U.S.C. § 1331** The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

**28 U.S.C. § 1346(f)** The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

**28 U.S.C. § 2409(a)** The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian land, nor does it apply to or affect actions which may be or could have been brought under

sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425 or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425 and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

**30 U.S.C. § 21a.** National mining and minerals policy; definition of minerals; execution of policy under other authorized programs; report to Congress.

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural

and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control and reclamation of mineral waste products, and the reclamation of mineral land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

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**30 U.S.C. § 22.** Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the

several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

**30 U.S.C. § 26.** Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations....

**30 U.S.C. § 28.** Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year....

**30 U.S.C. § 30.** Adverse claims; oath of claimants; requisites; waiver; stay of land office proceedings; judicial determination of right of possession; successful claimants' filing of judgment roll, certificate of labor and description of claim in land office, and acreage and fee payments; issuance of patents for entire or partial claims upon certification of land office proceedings and judgment roll; alienation of patent title

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable

diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

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**30 U.S.C. § 32.** Findings by jury; costs

If, in any action brought pursuant to section 30 of this title, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

**30 U.S.C. § 34.** Description of vein claims on surveyed and unsurveyed lands; monuments on ground to govern conflicting calls

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not

conform therewith; but where patents have been or shall be issued for claims upon surveyed lands, the Director of the Bureau of Land Management in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground....

**30 U.S.C. § 38.** Evidence of possession and work to establish right to patent

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661

of Title 43, in the absence of any adverse claim; but nothing in such sections shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. (R.S. § 2332.)

**30 U.S.C. § 623.** Recording and reporting of unpatented claims; time

The owner of any unpatented mining claim located on land described in section 621 of this title shall file for record in the United States District Land Office of the land district in which the claim is situated (1) within one year after August 11, 1955, as to any or all locations heretofore made, or within sixty days of location as to locations hereafter made, a copy of the notice of location of the claim; (2) within sixty days after the expiration of any annual assessment year, a statement as to the assessment work done or improvements made during the previous

assessment year.

**43 U.S.C. § 1744(a)** The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after the date of this Act shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual

assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by the Act of September 2, 1958 (72 Stat. 1701; 30 U.S.C. 28-1), relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed land on the ground.

(b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to the date of approval of this Act shall, within the three year period following the date of approval of this Act, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the

mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground....

(c) The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

REGULATORY PROVISIONS

Public Lands: Interior

43 CFR Ch. II (10-1-97 ed.)

**43 CFR § 1821.2-2** Time limit for filing documents

(a) The authorized officer will reject all applications to make entry which are executed more than

10 days prior to filing.

(b) Such rejections should be subject the right of appeal and to the right to file a new and properly executed application or to reexecute the rejected application, without priority.

(c) The authorized officer will accept as filed within the time named in paragraph (a) of this section all applications to enter which were deposited in the mails within 10 days from the date of execution.

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(g) When the regulations of this chapter provide that a document must be filed or a payment made within a specified period of time, the filing of the document or the making of the payment after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed or the payment as being timely made except where:

(1) The law does not permit him to do so.

(2) The rights of a third party or parties have intervened.

(3) The authorized officer determines that further consideration of the document or acceptance of the payment would unduly interfere with the orderly conduct of business.

**43 CFR § 3833.1-2** Manner of recordation--Federal lands

(a) The owner of an unpatented mining claim, mill site or tunnel site located on or before October 21, 1976, on Federal lands, excluding lands within units of the National Park System established before September 28, 1976, but including lands within a national monument administered by the United States and Fish and Wildlife Service or the United States Forest Service, shall file (file shall mean being received and date stamped by the proper BLM Office, a copy of the official record of the notice or

certificate of location of the claim or site filed under state law.

(c) The copy of the notice or certificates filed in accordance with paragraphs (a) and (b) of this section shall be supplemented by the following additional information unless it is included in the copy:

(1) The name or number of the claim or site, or both, if the claim or site has both:

(2) The name and current mailing address, if known, of the owner or owners of the claim or site;

(3) The type of claim or site;

(4) The date of location;

(5) For all claims or sites located on surveyed or unsurveyed lands, a description shall be furnished. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim or site to within a 160 acre quadrant of the section

(quarter section) or sections, if more than one is involved. In addition, there must be furnished the township, range, meridian and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable;

(6) For all claims or sites located on surveyed or unsurveyed land, either a topographic map published by the U.S. Geological Survey on which there shall be depicted the location of the claim or site, or a narrative or sketch describing the claim or site with reference by appropriate tie to some topographic, hydrographic or man-made feature. Such map, narrative description or sketch shall set forth the boundaries and positions of the individual claim or site with such accuracy as will permit the authorized officer of the agency administering the lands or the mineral interests in such lands to identify and locate the claim on the ground. More than one claim or site may be shown on a single map

or described in a single narrative or sketch if they are located in the same general area, so long as the individual claims or sites are clearly identified; and

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(8) Nothing in the requirements for a map and description found in this section shall require the owner of a claim or site to employ a professional surveyor or engineer.

(d) Each claim or site filed shall be accompanied by a one time $5 service fee which is not returnable. A notice or certificate of location shall not be accepted if it is not accompanied by the service fee and shall be returned to the owner.

**43 CFR § 3833.4** Failure to file.

(a) The failure to file an instrument required by §§ 3833.1-2 (a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed

conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void.

(b) The fact that an instrument is filed in accordance with other laws permitting filing or recording thereof and is defective or not timely filed for record under those laws, or the fact that an instrument is filed for record under this subpart by or on behalf of some, but not all of the owners of the mining claim, mill site, or tunnel site, shall not be considered failure to file an instrument under this subpart.

**43 CFR § 3871.3(a)** Upon the adverse claim being filed within the 60-day period of publication, the authorized officer will immediately give notice in writing to the parties that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within 30 days from the date of such filing to commence proceedings in a court of competent jurisdiction to

determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

(b) The Act of September 21 , 1961 (Pub. L. 87-260; 75 Stat. 541), amends the Act of June 7, 1910 (36 Stat. 459; 48 U.S.C. 386), and provides that adverse suits against mineral entries in Alaska shall be instituted within the 60-day time limit set forth in R.S. 2325 and 2326, (30 U.S.C. 29, 30). The act further provides that where a mineral patent application was filed prior to the effective date of the act, the time in which to file adverse suits is governed by the Act of June 7, 1910. Where a mineral patent application was filed prior to September 21, 1961, the entry will not be allowed until after the expiration of eight months following

the publication period.

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OREGON REVISED STATUTES (1997)

**ORS 517.010** Location of mining claims upon veins or lodes. (1) Any person, a citizen of the United States, or one who has declared an intention to become such, who discovers a vein or lode of mineral-bearing rock in place upon the unappropriated public domain of the United States within this state, may locate a claim upon such vein or lode by posting thereon a notice of such discovery and location. The notice shall contain:

(a) The name of the lode or claim.

(b) The names of the locators.

(c) The date of the location.

(d) The number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the lode or vein.

(e) The general course or strike of the vein or lode as nearly as may be, with reference to some natural object or permanent monument in the vicinity, and by defining the boundaries upon the surface of each claim so that the same may be readily traced.

(2)(a) Such boundaries shall be marked within 30 days after posting of such notice by four substantial posts, projecting not less than three feet above the surface of the ground, and made of wood measuring not less than one and one-half inch by one and one-half inch, or by substantial mounds of stone, or earth and stone, at least two feet in height, one such post or mound of rock at each corner of such claims.

(b) During the course of normal maintenance of the claim location posts or monuments, any post that requires replacement and is not constructed of naturally occurring materials shall be replaced by posts that are made

of wood measuring not less than one and one-half inch by one and one-half inch on a side and that project not less than three feet above the surface of the ground.

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**ORS 517.044** Location of claims upon placer deposits; posting notice. Any individual, a citizen of the United States, or one who has declared an intention to become such, who discovers a placer deposit of minerals upon the unappropriated public domain of the United States within this state, which minerals are subject to location under the mineral and mining laws of the United States, may locate a placer claim thereon by posting in a conspicuous place thereon a notice of such discovery and location. The notice shall contain:

(1) The name of the claim.

(2) The name of the individual or individuals locating the claim.

(3) The date of the location of the claim.

(4) The number of feet or acres claimed,

together with a description, either by legal subdivisions, if practicable, or if not, then by reference to some natural object or permanent monument in the vicinity of the claim, which will identify the claim located. [1961 c.525 s.2]

**ORS 517.052** Recording copy of location notice; fee. The individual locating a placer deposit shall, within 60 days from the posting of the location notice upon the claim, record with the clerk of the county where the claim is situated, a copy of the notice posted by the individual upon the claim. The fee for filing such location notice shall be the same as required by ORS 517.030 for recording location notices of mineral-bearing rock claims. The clerk shall immediately record the location notice in a book kept by the clerk for that purpose. [1961 c.525 s.5; 1971 c.228 s.3; 1991 c.230 s.26]

**ORS 517.080** Mining claims as realty. All mining claims, whether quartz or placer, are real estate. The owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005.

**ORS 517.090** Application to claims of law governing transfers and mortgages of realty. All conveyances of mining claims or of interests therein, either quartz or placer, whether patented or unpatented, are subject to the provisions governing transfers and mortgages of other realty as to execution, recordation, foreclosure, execution sale and redemption; but such redemption by the judgment debtor must take place within 60 days from date of confirmation, or such right is lost.

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# APPENDIX E

Are you in Sec. 3? The Illinois River isn't. If you are calling the plat a section your claim would cover more space than that of 1500 ft. Please check this again and return to the Land Office so that we can be sure we are recording your location correctly.

Land Office

Barnes handwritten response: Apparently former owner made error in description. I made error in mapping. Trust that this satisfactorily corrects your records. A. Donley Barnes.

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Please draw Wilson Placer Claim on enclosed plat so that this office can have a better record of its location.

Land Office

Please return location notice.

ADMINISTRATIVE RECORD IBLA CASE NO. 90-428
Appellants' Exhibits in Support of Statement of Reasons for Appeal Forest Service Mineral Claims Occupancy Report Dated 1-5-65, Exhibit No. 2-1-5

2810
Mining Claims
BARNES, a. Donley and Hazel
Siskiyou National Forest

MINERAL CLAIMS OCCUPANCY REPORT

A. Summary of Case:

On December 8, 1938 A.S. and Margaret Barnes, husband and wife, and A. Donley and Hazel Barnes, husband and wife, purchased a mining claim on the Illinois River near Stone Gulch Creek. On June 5, 1950 Margaret Barnes, widow of A.S. Barnes, deeded the claim to A. Donley and Hazel Barnes. The Barnes appear to use the house as a temporary home during part of the year.

The assessed value of the improvements was $1600.00 for the 1963 tax year.

The claim lies in the Illinois "A" area for surface

rights determination. No verified statement has been filed for this claim.

B. Claimant Identity:
A. Donley and Hazel Barnes
777 N.W. 4th
Grants Pass, Oregon

C. Reason for Examination:
Occupancy and use of mining claim.

D. Detailed Description:

1. Claim examiner
David C. Chamberlin, Forester
U.S. Forest Service
Cave Junction, Oregon

2. Dates of Examination
February 17, 1964
May 7, 1964
June 23, 1964

3. Lands Involved
Name of Claim
Navajoe
(renamed Wilson placer)
Date of Location
December 17, 1912
September 3, 1929
Recorded

| Vol | Pages |
|---|---|
| 21 | 71 |
| 31 | 44 |

This claim includes approximately 20 acres in section 3, T. 38S., R.9W.,W.M., surveyed, Siskiyou National Forest Josephine County, Oregon.

4. General Information and History

This claim is reached by driving west from Selma on the Illinois River road for 9.6 miles. This is an all weather road.

This claim may have an unbroken line of ownership dating from 1912. Two quitclaim deeds, H. Brazille to George Wilson and George Wilson to James Greig, are not recorded. George Wilson relocated and renamed the claim after he acquired the claim from Brazille in 1929. James Greig relocated and then filed an amended location notice after he acquired the claim in 1934. These relocations and the amended location may have created a break in the ownership. If a break was created in the line of ownership, the claim as now held was located during the time that the

land was under the general area power withdrawal of January 6, 1926 and before the restoration act of August 11, 1955. If a break in the line of ownership was not created, the claims were located prior to the power withdrawal.

The 2-story house was built in 1913 near the site of the old Store Gulch store. About 3 or 4 acres have been cleared for use as a garden and orchard, but this has been neglected for quite a few years.

No one was seen around the cabin until June 23, 1964 when Mrs. Barnes, her daughter, and some grandchildren were seen to be living in the house. On August 26 I talked to Mr. Barnes at the county courthouse. He said that someone had been living at the claim all summer and that during the winter they usually spend about three weekends a month on the claim. Mr. Barnes is County Clerk for Josephine County, Oregon.

5. Description of Claims and Mining Activity

The Wilson placer claim is tied to the west section line of section three and is on the north side of the Illinois River. The north bank of the river has been heavily mined many years ago, but there has been little activity in the past few years. One small area has been worked in the last 2 or 3 years. A ditch, 75 feet long, was dug from Store Gulch Creek in order to mine it.

One claim corner, the northwest was found. This corner is a pile of rocks near the section line 600 ft. north of the river.

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E. Conclusions:

This claim may have been located before the time that the land was under a power withdrawal. It does not appear that the claimants are actively engaged in mining the claims. Instead, it appears that the claim is used as a

temporary summer home. The occupancy of the claim by the Barnes does not seem to conform with the mining laws.

A mineral examination should be made to determine the validity of the claim.

Prepared by:
David C. Chamberlin
Forester
1-4-65

F. Ranger's Recommendations

Portions of this claim would be valuable for the development of a public campground along the Illinois River. The area has the potential of eventually replacing the nearby Store Gulch Campground, which is high on the hill some 150 feet in elevation and 1/8 mile above the river. The claim area was not inventoried as a potential development site during the NFRS. The area was bypassed because it was then believed to be a valid claim.

Our long range goal is as follows:

1. Mineral examination and determination as to

whether the claim is apparently valid or invalid.

2. Inventory the site in the National Forest Recreation Plan, if the claim is apparently invalid.

3. Request withdrawal from mineral entry for a recreation development site.

4. Relinquishment or invalidation of the claim.

5. Removal of buildings and improvements.

6. Campground Construction beginning about 1972, depending on available finances.

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OREGON DISTRICT COURT CR 69. Forest Service Environmental Assessment Reports Dated April 14, 1980 For Approval of Wilson Claim Plan of Operation.

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
ILLINOIS VALLEY RANGER DISTRICT
P.O. BOX 389
Cave Junction, Oregon 97523

April 14, 1980

REPLY TO: 2810 Mining Claims

1950 Environmental Assessment Reports

SUBJECT: Freeman, Conrad; Farmer, Larry, Plan of Operation

TO: District Ranger, Illinois Valley

I. INTRODUCTION

Mr. Larry Farmer has submitted the attached Plan of Operation for development of the Wilson Placer claim located along the Illinois River in the NW¼ of Sec.3., T38S., R9W., W.M., within Josephine County, Oregon. The claim lies between the Illinois River Road #3504 and the Illinois River.

The purpose of this assessment is to analyze the impacts of the proposed mining operation on the quality of the environment and the recreational values of the area.

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The Study Report for the Proposed Wild and Scenic Illinois River (page 103), recommended "that the mineral

withdrawal remain in effect in this area if the river is added to the national system. By doing so, new mineral locations would be foregone but existing valid mineral claims which predate October 2, 1968 could be worked providing river values are not adversely affected".

On April 2, 1980, I traced the history of the Wilson Placer claim in the Josephine County Recorder's office. The claim was originally filed on 12/17/12 and has had an unbroken chain of ownership to the present owners. Annual assessment work has been kept up since the withdrawal went into effect. The claim has also received the Bureau of Land Management serial number ORMC 19689 as required by the FLPMA law of October 21, 1976. (This was also verified through the Regional Office via Don Wood per telecon $/7/80).

The following map designates the claim as it relates to the Store Gulch withdrawal. The entire claim is within

the Wild & Scenic Withdrawal. (Page 4)

Recreation along the Illinois River is very popular for fishing, camping, gold panning and rafting. The Store Gulch campground, located approximately 300 yards northeast of the cabin site, is a developed site with tables, fire pits, outhouse and water. Camping use is minimal but the site is used heavily in the summer months by day users primarily for swimming and picnicking. The swimming area is upstream from the proposed mining site about 200 yards and around a bend in the river.

Most of the rafting activity on the Illinois occurs downstream from Store Gulch at Miami Bar, approximately 6 miles.

III. ALTERNATIVES AND THE PROPOSAL:

The choice to mine National Forest lands is granted by law to the claimants. The land is open to mining as it was filed and maintained prior to the mineral

withdrawals.

Water for the mining operation will be taken from Store Gulch via two existing mining ditches and piped into sluice boxes or a small trommel. Waste water will be filtered through two settling ponds, each in natural depressions with a two to three foot high dam.

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Even though the area is within a withdrawn section of public lands for mineral entry, the claim does meet all requirements to be legally mined.

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Prepared By: _____ _____
Greg R. Schimke DATE
Minerals Technician

ADMINISTRATIVE RECORD IBLA CASE NO. 90-428. Appellants' Exhibits in Support of Statement of Reasons for Appeal Forest Service Decision Notice Dated April 16, 1980 for Approval of Wilson Claim Plan of Operations Exhibit No. 26-B.

DECISION NOTICE
Wilson Placer Claim
Environmental Assessment Report
Illinois Valley Ranger District
Siskiyou National Forest

Based on the analysis and evaluation described in the Environmental Assessment Report for this project, it is my decision to approve the operating plan submitted by Larry Farmer for the Wilson Placer Claim.

The proposal is for the construction of two small settling ponds and the mining of 1/3 acre of old river channel. Top soil will be stripped and stored. It will be replaced upon completion of mining.

My decision is based on the fact that this is a reasonable exercise of a miner's rights. The claim is valid. Reclamation work can restore the area upon completion of the operation.

The Environmental Assessment Report does not indicate that there will be any significant effect upon the

quality of the human environment. Therefore, it has been determined that an environmental statement is not needed.

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Approved by: _____ April 16, 1980
James A. Schelhaas DATE
District Ranger

ADMINISTRATIVE RECORD IBLA CASE NO. 90-428
Appellants' Exhibits in Support of Statement of Reasons for Appeal Affidavit of Gary Hoefler 7/26/90. Exhibit 26-1

UNITED STATES DEPARTMENT OF THE INTERIOR
INTERIOR BOARD OF LAND APPEALS

| | | |
|---|---|---|
| IN THE MATTER OF | ) | IBLA No. |
| GARY HOEFLER, et al. | ) | AFFIDAVIT OF |
| WILSON PLACER MINING | ) | GARY HOEFLER |
| CLAIM | ) | |
| ORMC 19689 | ) | |
| | | |
| STATE OF OREGON | ) | |
| | )ss. | |
| County of Josephine | ) | |

I, Gary Hoefler, being duly sworn under oath say:

I am one of the owners of the Wilson Placer Mining Claim and an Appellant in the above referenced case.

In November 1988, I accompanied Gordon Lyda and John Nolan of the Forest Service and Jim Chenoweth, Dan Allen, Cameron Anderson and another person whose name I don't recall, in a Forest Service mineral examination of the discovery of valuable minerals on the Wilson Placer Mining Claim.

From discussions with the Forest Service, it was my understanding that it is sufficient for mineral validity purposes to test just enough discovery points to evidence the existence of valuable locatable minerals meeting government discovery standards. Because we had actually recovered profitable quantities of gold to show a substantial discovery based on our streambed dredging operations, we did not prepare for and bring in equipment for testing discovery points for materials processed by sluicing which involve more extensive gold discovery throughout 3/4 or perhaps more of the Wilson Claim. Gordon Lyda, the

Forest Service mineral examiner verified our findings. After completing panning tests from dredging samples at three discovery points, Gordon Lyda, in effect, said that the results were sufficient to show the existence of a discovery under today's gold prices and no further testing was necessary.

During 1989 and 1990, I contacted Gordon Lyda and Reb Bennett of the Forest Service several times to obtain a copy of the mineral report of the mineral examination made in 1988. I was finally informed that the report would not be released to me because Reb Bennett was withholding approval and release of the report.

Although the mineral examination apparently established a strong discovery under current gold prices, from my discussions with Gordon Lyda and other Forest Service employees, the Forest Service plans at some future time to request the Bureau of Land Management to initiate

contest proceedings alleging the Wilson Claim lacks a discovery of valuable minerals, and is invalid under the mining laws.

Based on information and belief, the Forest Service after reviewing the mineral report decided not to request the Bureau of Land Management to initiate proceedings to contest and invalidate the Wilson Claim for lack of mineral discovery. Rather than contesting the Wilson Claim discovery, the Forest Service requested that the Bureau of Land Management to invalidate the claim by administrative decision on the basis of its allegations and analysis concluding that the historic of Wilson Claim and possessory title were defective.

The arrangement contrived by the Forest Service and adopted by the government when the Bureau of Land Management Oregon State Office issued a decision declaring our Wilson Claim null and void, deprives us of an

opportunity for a timely, efficient and fair proceeding for a single determination of disputed facts concerning discovery and location and possessory title defects. Arranging two separate proceedings will extend over many years time and obviously will consume and perhaps exhaust our finances.

Although Wilson Claim operations would provide an immediate source of income for protecting our rights, the Forest Service has ordered a stop of our Wilson Claim operations during the pendency of the Department of the Interior proceedings. I think that the Forest Service action is illegal and does not make good sense. The Forest Service decision closing down our operations was not made on the basis that our operations would present environmental or resource problems. Our planned operations will be conducted without any harmful environmental effects or adverse impacts on resources.

In addition, I cannot see any basis for declaring

our Wilson Claim null and void for location or title defects. The land and possessory title were actually and continuously possessed for over 70 years. Evidence of that possession at all times was of official record with Josephine County. The Wilson Claim notice of location had been of record with the Bureau of Land Management for about 35 years and the Forest Service had carefully studied the location and possessory rights several times over the past 30 years. Maintenance of Wilson Claim work is a matter of public record with Josephine County. I believe that the evidence of location, possession and title are overwhelming and sufficient for the State of Oregon courts to affirm our location and possessory rights and title against all persons.

We believe that in these circumstances that our Wilson Claim location and title have been long established and that the mining laws give us rights to possess and use the unpatented Wilson Claim for mining purposes and

patenting.
Dated: 7/26/90

Gary Hoefler
Affiant

Subscribed and sworn to before me this 26th day of July, 1990 at Cave Junction Oregon.

NOTARY SEAL

ADMINISTRATIVE RECORD IBLA CASE NO. 90-428
Letter Dated August 25, 1989 From Petitioners' Attorney to BLM Providing Additional Information and Requesting BLM Obtain all Forest Service Records Pertaining to Wilson Claim Possessory Title.

ROGER DIERKING
*Attorney at Law*

August 25, 1989

Robert E. Mollohan
Chief, Lands and Minerals
Adjudication Section
Oregon State Office
Bureau of Land Management
P.O. Box 2965
Portland, Oregon 97208

Re: 3833 (943), ORMC 19869, Wilson Placer Claim

Dear Mr. Mollohan:

Please find enclosed supplemental information

requested by your decision dated August 2, 1989:

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3. If a chain of title or title by adverse possession did not exist, equitable estoppel principles bar denial of the validity of the Wilson claim possessory title.

The facts in this case invoke the equitable estoppel doctrine to prevent an unfair application of law to invalidate the Wilson mining claim. United States v. Madison D. Locke, 471 US 84, 85 L Ed 2d 64, 105 S Ct 1785, Concurring Opinion of Justice O'Connor, 471 US 110; U.S. v. Wharton, 514 F.2d 406 (1975).

No adverse claims would be affected by application of the equitable estoppel doctrine. The Wilson claim ownership is historic. The Government's Forest Service records are believed to contain information establishing that the Government by its actions and representations led the claim owners to believe that there

was no need to relocate the claim during 1955 to 1968 period when the lands were open to mining location. Therefore, if any question remains concerning proof of possessory title, the Forest Service should provide a copy of all of its records for Bureau of Land Management evaluation of the equitable estoppel doctrine.

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Roger Dierking
Attorney for Owners

ADMINISTRATIVE RECORD IBLA CASE NO. 90-428
Appellants' Statement of Reasons and Request for Hearing
Dated July 30, 1990

July 30, 1990

UNITED STATES DEPARTMENT OF THE INTERIOR
INTERIOR BOARD OF LAND APPEALS

| | | |
|---|---|---|
| APPEAL OF | ) | NO. IBLA 90-428 |
| GARY HOEFLER, ET AL. | ) | |
| _____ | ) | |

STATEMENT OF REASONS
AND
REQUEST FOR HEARING

ROGER F. DIERKING
Attorney at Law
13513 N. E. Beech Street
Portland, Oregon 97230
(503) 257-7056
Of Attorneys for Appellants

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In November 1988, the Forest Service examined the Wilson Claim to establish whether a discovery of valuable minerals had been made. The Forest Service reviewed its mineral report but decided to withhold final approval of the Forest Service Technical Reviewer and withheld release of the report to the Appellants. (Affidavit of Gary Hoefler Exhibit 26.).

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9. Request for a Hearing.

In the event the Board does not accept the statement of reasons as establishing: (1) a regular chain of title to validate the Wilson Claim as relating back to the

Navajoe Claim; or (2) title to the Wilson Claim by adverse possession under 30 U.S.C. Sec. 38 and acceptable recordation under 43 CFR 3833.1-2(a); or (3) the government is barred by equitable estoppel or laches from denying the validity of the Wilson Claim, then Appellants respectfully request that the Board allow opportunity for Appellants to submit additional documents, an Oregon court determination establishing Appellants' title, or a federal district court order pursuant to 28 U.S.C. Sec. 2409a quieting any adverse interest of the United States in the Wilson Claim, as the Board determines as necessary for evidencing Appellants interest in the Wilson Claim.

In the event that the Board does not accept this Statement of Reasons or allow for the submission of additional evidence determined to be required to show a valid Wilson Claim, then Appellants respectfully request, pursuant to 43 CFR Sec. 4.415, that the Board allow a

hearing for Appellants to present further evidence on facts disputed by the Oregon State Office concerning the date of location, adverse possession and equitable estoppel, which obviously raise questions of fact to be decided at through the hearing process.

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Dated: July 30, 1990.

Respectfully submitted,
Roger F. Dierking
Of Attorneys for Appellants